PATRICK BURNETT

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REFERENCES

Professor Laura Dickinson
Oswald Symister Colclough Research Professor of Law
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Research Assistant Position Supervisor
National Security Law Professor, Fall 2019

Ambassador Akbar Ahmed
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Patrick Burnett
The George Washington University Law School
Cumulative GPA: 3.904

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	Colby, Thomas	A+	3.00	
Contracts I	Schooner, Steven	A-	3.00	
Criminal Law	Weisburd, Kate	A-	3.00	
Legal Research and Writing	Josendale, Erin	B+	2.00	
Torts	Suter, Sonia	B+	4.00	

Semester GPA: 3.667

Thurgood Marshall Scholar (Top 16-35% of the class to date)

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Berman, Paul	A-	3.00	
Constitutional Law I	Fontana, David	A	3.00	
Contracts II	Schooner, Steven	A	3.00	
Introduction to Advocacy	Josendale, Erin	B+	2.00	
Property	Nunziato, Dawn	A+	4.00	

Semester GPA: 3.933

George Washington Scholar (Top 1-15% of the class to date)

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Field Placement		CR	2.00	Credits earned for internship with Arlington Immigration Court
The Craft of Judging	Beck, Ronna	A+	2.00	

GPA: 4.333

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Gavoor, Aram	A+	3.00	
Evidence	Kirkpatrick, Laird	A	3.00	
International Law	Steinhardt, Ralph	A	4.00	
National Security Law	Dickinson, Laura	A	3.00	

Semester GPA: 4.077

George Washington Scholar (Top 1-15% of the class to date)

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Wyrsch, Raymond	CR	4.00	
Federal Courts	Gavoor, Aram	CR	3.00	

Immigration Law I	Golparvar, Kuyomars	CR	3.00
Information Privacy Law	Solove, Daniel	CR	3.00

During the Spring 2020 semester, a global pandemic caused by Covid-19 resulted in significant academic disruption.

Per the Senior Associate Dean for Academic Affairs: "For the Spring 2020 semester, all courses are to be assigned CR/NC marks, with CR corresponding to C- or better had the work been letter-graded, and NC corresponding to lower than C- had the work been letter-graded. This policy is mandatory for all Spring 2020 courses and applies regardless of when the work for each course was completed."

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law and the Supreme Court	Thomas Colby		2	
Criminal Procedure	Mary Cheh		3	
Cybersecurity Law and Policy	Edward McNicholas		2	
Field Placement	N/A	N/A	3	Interning with Judge Randolph Moss of the District Court for the District of Columbia for credit.
Professional Responsibility and Ethics	David Cohen		2	

Grading System Description

Letter grades are given with numerical equivalents as follows.
A+ = 4.33
A = 4.0
A− = 3.66
B+ = 3.33
B = 3.0
B− = 2.66
C+ = 2.33
C = 2.0
C− = 1.66
D = 1.0
F = 0

The majority of courses are graded on a letter-grade basis, but for some courses (primarily those that are clinical or skills-oriented), the grade of Credit (CR) or No Credit (NC) is given or the following grading scale is used: Honors (H), Pass (P), Low Pass (LP), and No Credit (NC).

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

September 04, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend my student, Patrick Burnett, for a clerkship in your chambers. Patrick is a stellar student – number 14 in his law school class – who writes beautifully, has terrific research skills, and works incredibly well with others. I give him my highest recommendation.

I first got to know Patrick when he enrolled in my national security law class in the fall of 2020, and I was immediately impressed by his ability and his intellect. The class is an extraordinarily challenging one, because it covers a variety of bodies of law (international and domestic, constitutional and statutory) and the legal issues are highly complex. Students must parse the intricacies of the Foreign Intelligence Surveillance Act (FISA), comprehend the detailed procedures related to criminal prosecutions in U.S. military commissions, as well as understand fundamental principles of constitutional law regarding separation of powers and the use of force. Moreover, I demand a lot of the students in class, as I use the Socratic method and call on them every day. From the very beginning of the semester, it was clear that Patrick was well-prepared and had an excellent understanding of the issues and materials. I knew I could count on him to dissect even the most complicated cases and explain them succinctly and lucidly.

As the course of the semester progressed, it became all the more evident that Patrick was one of the top – if not the top – students in the class. He stood out even in a group of very experienced students, some of whom were earning L.L.M.'s after working in the national security field as military lawyers, in the U.S. Congress, at the U.S. Department of State, or at the Central Intelligence Agency. He was able to answer questions not only about the materials assigned, but also to reflect on the principles embedded in the cases or other materials and apply them to hypothetical new cases and situations in a clear, thoughtful manner. Moreover, he was always extremely articulate and reasoned very persuasively. As a result, I was not surprised to find that Patrick wrote one of the two best exams for the class, in a group of unusually strong exams. It addressed every issue that I had hidden with the fact-pattern issue-spotter questions – a rare feat, as the diverse bodies of law covered make issue-identification particularly challenging in my exams. Then, in response to the "policy" question I had posed on FISA reform, Patrick wrote a truly brilliant, nuanced yet clear, argument for specific FISA revisions. It helps that he is an excellent writer, which really shows under time pressure.

Patrick's stellar performance in my class led me to invite him to serve as my research assistant this past spring, and I was very pleased that he accepted. He helped me with an article I am writing about international and domestic legal issues that crop up at the end of armed conflicts, with Syria as a case study. I assigned Patrick a series of research memos to write on a variety of topics, such as analyzing the legal rationales for the extraterritorial use of force by multiple countries and mapping out accountability options for wartime atrocities. These memos were quite challenging to write, as they entailed complex research on other countries' national security law decision-making. Patrick was unusually resourceful in digging up hard-to-find sources such as cases and parliamentary reports from other countries and materials from international bodies, and he analyzed them all precisely and thoroughly. Furthermore, he was able to produce a large number of clearly written memos on a short turnaround. He is a terrific writer, and his work for me has been invaluable. Indeed, he is so good that I have offered him the opportunity to co-author a national security blog post with me. Patrick is one of the three best research assistants I have had in more than 20 years of law teaching.

In addition to standing out in my class and as my research assistant, Patrick has not only excelled in most of his classes, but also made an extraordinary contribution to, and demonstrated leadership in, a wide range of extracurricular and professional activities. Patrick is one of our very top students at The George Washington University Law School (GW Law) – number 14 in the class, as noted above. Moreover, he has managed to earn that ranking while pursuing a daunting array of additional activities. For example, this past winter break, he traveled to New Orleans as part of GW Law's Gulf Recovery Network Project to volunteer with the Louisiana State Bar Association. There, he conducted research on how other states have expanded or limited the scope of legal representation within the bounds of ABA's Model Rules of Professional Conduct. This past spring break, he traveled to El

Paso, Texas and Juarez, Mexico, as part of GW Law's Immigration Law Association. He met with community leaders, judges, lawyers, and asylum seekers to understand the legal challenges underlying the recent influx of asylum seekers into the United States. He has also worked for my colleague, Professor Dan Solove, on his world-renowned annual privacy conference. And he is now serving as Articles Editor for The George Washington Law Review.

I also want to take a moment to draw attention to Patrick's Note for the Law Review, "A Lifeline for Customary International Law under the Erie Doctrine." Patrick developed this topic following up on a discussion we had in my national security law class and during my office hours. I had suggested that there was important historical research to be done to investigate theories about the relevance of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), to the debate about the role of customary international law in U.S. Courts. For example, Judge Kavanaugh argued in a concurrence in Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010), that the Erie doctrine would preclude federal courts from considering customary international law in many circumstances. I suggested there might be additional historical research that could inform this question. The energy, enthusiasm, and skill with which Patrick dove into this topic were impressive. He unearthed very useful historical materials that I believe will shed new light on this important debate. For example, he delved into the Court's rationale for Erie by exploring related decisions of Justices Brandeis, Hughes and Stone. Furthermore, he listened carefully to my advice about how to write a good note and to craft a strong legal argument. It is the most promising, original student Note that I have advised in all my years of law teaching.

Finally, I should also mention that, in the encounters I have had with Patrick, both in the classroom and as my research assistant, he has displayed notable collegiality and professionalism. For example, in the classroom, when he advocated a position different from another student, he always did so respectfully in a way that acknowledged the best of the other student's arguments. In addition, as my research assistant, he worked with two other students and served a very important coordinating role for the group.

In sum, I think very highly of Patrick. As someone who served as a law clerk both at the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court, I have a background to understand what is required for the position. If I were a judge, I would certainly interview Patrick, and I recommend that you give his application very careful consideration.

Best,

Laura A. Dickinson
Oswald Symister Colclough Research Professor
and Professor of Law
202-994-0376
ldickinson@law.gwu.edu

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2000 H Street, NW
Washington, DC 20052

September 04, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to enthusiastically recommend Patrick Burnett for a clerkship in your chambers. Patrick's intellect, passion for the law, work ethic, and poise make him an ideal candidate.

Patrick is a student in my Federal Courts course and he took my Administrative Law course last semester. Despite being two of the most difficult course offerings at The George Washington University Law School due to the breadth and complexity of the subject-matter, Patrick has exceled. He asks refined questions that are premised on a nuanced comprehension of the readings. He provides thoughtful and correct answers to my Socratic questioning. I was particularly impressed when his exam performance earned him an A+ grade in Administrative Law. Patrick's stellar performance in my course is unremarkable, though, by his standards because he has earned an A+ grade each semester of his law school career.

In my numerous conversations with Patrick, I have encouraged him to clerk. He is genuinely interested in the law and the judicial experience. His legal training and executive branch intern experience have fostered within him an unusually strong ability to read and apply statutory schemes in practical settings. The confluence of his demonstrated commitment to public interest and his brilliance—he holds a 3.9/4.0 grade point average—will make him a capable advocate for the downtrodden and unenfranchised in his post-clerkship public interest law career. His experience as an articles editor on The George Washington Law Review has honed his excellent writing and editing skills. I believe that your investment in him as a law clerk will yield splendid results in terms of his timely and thoughtful contributions to your legal research and writing needs.

Patrick also has the temperament to capably serve as a clerk. He is humble, yet assertive. He is thoughtful, yet timely in his responsiveness. Most importantly, he is mature and exercises sound judgment with minimal need of supervision. If you have any questions about or would like to discuss my unreserved recommendation of Patrick, please do not hesitate to contact me at (917) 562-9230 or at agavoor@law.gwu.edu.

Sincerely,

Aram A. Gavoor
Professorial Lecturer of Law

Patrick Burnett
645 Rhode Island Ave, NW, Apt. 105, Washington, DC 20001 | pburnett@law.gwu.edu | (330) 620-4173

Writing Sample

The attached writing sample is an excerpt of my Law Review Note. It has been edited by the adjunct professor who taught the course, the Law Review Notes Editor who was assigned to my section, and three peers. I have submitted the Note for publication with *The George Washington Law Review*, but final publication determinations have not been made as of the time of application. I have included my abstract below to give greater context to the excerpt.

Abstract: *Then-Judge Brett Kavanaugh of the D.C. Circuit argued in his concurring opinion in* Al-Bihani v. Obama *that the* Erie *doctrine precludes the use of customary international law ("CIL") norms in federal court not only as a rule of decision, but as a tool of statutory interpretation. Thus, he argued the petitioner could not challenge his detention at Guantanamo Bay on the basis of international law-of-war norms. While the use of CIL as a tool of statutory interpretation is a well-established practice in federal courts, Justice Kavanaugh's elevation to the Supreme Court threatens to bring this practice to an end. This Note illustrates that contrary to the arguments outlined in Kavanaugh's* Al-Bihani *opinion, it is consistent with the views of the justices who decided* Erie R.R. Co. v. Tompkins *that CIL may be used as a tool of constitutional, treaty, and federal statutory interpretation. This Note then argues that using a narrow set of CIL norms in federal statutory interpretation may prove persuasive with Chief Justice Roberts because of his eye towards institutional legitimacy, indicating a potential pathway for preserving the use of CIL norms in federal statutory interpretation despite a conservative majority on the Supreme Court. So long as litigants are careful in selecting the CIL norms they cite in their statutory interpretation arguments, a lifeline exists for their use in federal court thanks to the* Erie *Court's views on the matter and Chief Justice Roberts's incrementalist view of the Court's role in shaping U.S. law.*

Patrick Burnett

A Lifeline for Customary International Law under the *Erie* Doctrine

INTRODUCTION [Removed for the purposes of this excerpt]

I. The *Erie* Doctrine and CIL [Removed for the purposes of this excerpt]

II. The *Erie* Court's View on International Law [Removed for the purposes of this excerpt]

III. Chief Justice Roberts's View on International Law

The historical precedent of the *Erie* Court illustrates that *Erie* was never intended to overhaul the role of international law in domestic courts. However, the role of international law in domestic courts has nevertheless been proscribed under the *Erie* doctrine, as demonstrated most significantly by the *Sosa* decision. While *Sosa* leaves the door open for the use of international law in domestic courts, it has nonetheless narrowed the doorway.[1] With Justice Kavanaugh joining the Supreme Court, given his concurrence in *Al-Bihani*,[2] there is reason for concern that this doorway could be dramatically narrowed to even preclude the use of CIL norms as a tool of statutory interpretation.[3] However, looking to the past opinions of one of Kavanaugh's fellow conservatives on the bench, Chief Justice John Roberts, indicates that given the right litigation strategy, the limited scope of CIL norms preserved by *Sosa* can remain preserved in federal courts as a legitimate means of statutory interpretation.[4]

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[1] *See supra* Section I.C.
[2] Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010).
[3] *See supra* Section I.D.
[4] It is worth noting why this Note does not consider the views of the other three conservatives on the bench. Justice Gorsuch has professed that he views no role for CIL in federal courts. In his concurrence in *Jesner v Arab Bank*, 138 S.Ct. 1386 (2018), Gorsuch argued that international law is part of the general federal common law, which was eliminated by *Erie*. *Id.* at 1416. Justice Alito found himself in agreement with Gorsuch regarding the validity of the *Sosa* holding, particularly in light of the *Erie* doctrine. *Id.* at 1409. Justice Thomas, meanwhile, does not believe that courts should create new causes of action under the Alien Tort Statute ("ATS"). *Jesner*, 138 S.Ct. at 1408 (Thomas, J., concurring). On the contrary, the four liberal justices on the bench have established that they are open to the use of CIL norms in federal court. Justices Ginsburg and Breyer joined the Court in Part IV of *Sosa*, which established that *Erie* left the door ajar to "a narrow class of international norms." *Sosa*, 542 U.S. at 695, 724, 729. Justices Sotomayor and Kagan endorsed this holding in *Sosa* in signing onto Justice Breyer's concurrence in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 127–28 (2013).

Chief Justice Roberts's drafted opinions indeed indicate he carries some skepticism as to whether there is a role for CIL in federal courts.[5] However, Roberts avoided questions about the role of CIL in federal law in several cases by deciding the case on narrower issues, perhaps indicating a desire at a minimum to avoid the question as to the relevancy of CIL under the *Erie* doctrine.

In *Sanchez-Llamas v. Oregon*,[6] the Court addressed whether Article 36 of the Vienna Convention on Consular Relations ("VCCR"), a provision granting foreign nationals a right to communication with a consular officer when detained abroad, grants individual defendants rights which may be invoked in judicial proceedings when the terms of the VCCR are not followed by authorities.[7] The Court held that the terms of the treaty itself would have to explicitly permit federal authorities to create a judicial remedy at the state level.[8] Thus, Article 36 is held to merely secure the right of foreign nationals to have their consulate informed if they are arrested or detained by government officials.[9] The Court also held that the principle that the procedural rules of a state's domestic laws generally govern how a treaty is implemented is rooted in international law.[10] The Court held furthermore that holdings of the International Court of Justice ("ICJ") do not control in U.S. courts because the ICJ is designed to arbitrate disputes between national governments and, per the ICJ Statute, their holdings have no binding force outside the parties to the case.[11]

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[5] The cases were found through searches on Westlaw for the terms "law of nations," "international law," "law of war," and "Charming Betsy," as narrowed to the Supreme Court and the D.C. Circuit and Roberts as the judge/justice drafting the opinion.
[6] 548 U.S. 331 (2006).
[7] *Id.* at 337, 340, 342–43.
[8] *Id.* at 346–47.
[9] *Id.* at 349.
[10] *Id.* at 351, 356 (citing Breard v. Greene, 523 U.S. 371, 375 (1998)).
[11] *Id.* at 354–55.

The Court continued its evaluation of Article 36 of the VCCR in *Medellin v. Texas*,[12] but shifted its focus to the direct enforceability of an ICJ judgment as domestic law in a U.S. state court.[13] Petitioner, a Mexican national convicted of murder, filed a petition for a writ of habeas corpus on Article 36 grounds, only to have it denied by the Texas Court of Criminal Appeals on timeliness grounds.[14] The case focused on an ICJ case, the *Avena* judgment, which held that the United States violated the VCCR by failing to inform 51 Mexican nationals of their consular consult rights under the VCCR.[15] The Court held that neither the provision of the VCCR regarding ICJ jurisdiction, nor the United Nations Charter, nor the ICJ Statute are self-executing, and thus none of them create binding legal obligations in U.S. courts absent legislative action to implement their provisions.[16] The Court acknowledged that the *Avena* judgment creates an international law obligation, but it does not create federal law which preempts state law.[17] Regarding a memorandum President George W. Bush wrote to the Attorney General calling on the federal government to require state courts to give effect to the *Avena* judgment, the Court emphasized that legitimate presidential power must stem from either the Constitution or an act of Congress, and that neither source grants the president the power to "unilaterally [convert] a non-self-executing treaty into a self-executing one."[18]

Sanchez-Llamas and *Medellin* indicate that Chief Justice Roberts is hesitant to apply treaty law to the states. *Medellin* also suggests that Roberts is hesitant to allow the executive

[12] 552 U.S. 491 (2008).
[13] *Id.* at 497–98.
[14] *Id.*
[15] *Id.* at 502.
[16] *Id.* at 504–06.
[17] *Id.* at 527–28.
[18] *Id.* at 498, 524–25. The Court went on to note that the President "seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling. Such considerations, however, do not allow us to set aside first principles." *Id.* at 524.

branch to exercise too much power in bridging the gap between U.S. international law obligations and constitutional obligations under federalism. Thus, these two cases indicate that Roberts is skeptical about applying international law of any sort upon the states without congressional authorization. However, Roberts does not address the role of international law under federal law in these and related cases.

In *Kiobel v. Royal Dutch Petroleum Co.*,[19] the Court evaluated whether Nigerian plaintiffs could bring suit under the Alien Tort Statute ("ATS")[20] against corporations incorporated in the Netherlands, England, and Nigeria over an alleged conspiracy with the Nigerian government to commit human rights violations against those protesting mass oil drilling in Ogoniland, Nigeria.[21] The Court held that the ATS does not contain a clear indication of extraterritoriality, which is what would be required to permit the statute to be used as a jurisdictional basis for a case involving foreign parties and an act which occurred entirely on foreign soil.[22] This case indicates on its face that Roberts will uphold the presumption against extraterritoriality whenever possible. However, as Professor S. Ernie Walton argues, because the original question on certiorari in *Kiobel* was "whether the law of nations recognized corporate liability for human rights abuses," Roberts had the opportunity in this case to express his view on the role of CIL in federal courts.[23] By narrowing the scope of the issue to an ATS jurisdictional matter, though, Walton states that Roberts avoided the issue and entrusted Congress with

[19] 569 U.S. 108 (2013).
[20] 28 U.S.C. §1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").
[21] *Kiobel*, 569 U.S. at 113.
[22] *Id.* at 118, 124. The Court added that it sees the presumption against extraterritoriality as fostering a sense of comity among nations, ensuring that U.S. citizens cannot easily be hauled into courts of other countries for alleged violations of the law of nations in the United States or elsewhere outside their jurisdiction. *Id.* at 124.
[23] S. Ernie Walton, *The Judicial Philosophy of Chief Justice John Roberts: An Analysis Through the Eyes of International Law*, 30 EMORY INT'L L. REV. 391, 429 (2016) (citing *Kiobel*, 133 S. Ct. at 1663).

maintaining control over the issue.[24] This may indicate that Roberts is trying to avoid addressing the role of CIL in federal courts if at all possible.

In *Bond v. United States*,[25] the Court considered whether the Chemical Weapons Convention Implementation Act of 1998, enacted to execute provisions of the International Convention on Chemical Weapons into U.S. law, was intended to cover the use of a prohibited chemical by one individual against another in a manner which only results in a minor injury.[26] The Court held that the object and purpose of the treaty did not cover minor interpersonal crimes, but rather focused on war crimes, terrorism, and the like, and thus could not criminalize the action at bar.[27] However, the Court held there is no need to address the treaty to resolve the case; rather the Court only needed to interpret the relevant statute.[28] This case further illustrates that while Roberts is skeptical about the role of international law in federal courts, he will avoid addressing the issue if at all possible.

Roberts is not totally averse to the use of CIL in federal courts though. In a concurrence in *Upper Skagit Indian Tribe v. Lundgren*,[29] a case regarding Native American sovereign immunity in a property title suit, Roberts commented that it is "a settled principle of international law" that foreign states owning property outside territory are to be treated like private individuals.[30] This comment suggests that he is willing to consider international law in a narrow set of cases.

Scholars have found Roberts to have a narrow vision for the role of international law in federal courts, in line with both his conservative legal philosophy and his eye towards

[24] *Id.*
[25] 134 S.Ct. 2077 (2014).
[26] *Id.* at 2083, 2085.
[27] *Id.* at 2087.
[28] *Id.* at 2088.
[29] 138 S.Ct. 1649 (2018).
[30] *Id.* at 1655.

institutional legitimacy. Professor Walton, in analyzing Chief Justice Roberts's opinions regarding international law, argues that his opinions to date reflect what he terms as Roberts's prudentialist judicial philosophy.[31] Walton states that this philosophy is reflected in Roberts's *Medellin*, *Sanchez-Llamas*, and *Kiobel* opinions, which demonstrate his commitment to leaving foreign affairs in the hands of the political branches and maintaining a firm separation of powers.[32] Walton also argues though that Roberts's holding in *Bond* indicates, in addition to his views on the separation of powers, that he favors deferring to precedent and seeks to avoid making broad rulings on a constitutional basis.[33] Furthermore, Walton notes that Roberts has not yet discussed his views on the status of CIL as federal common law.[34]

Professor Melissa A. Waters, meanwhile, argues that Roberts's decision in *Sanchez-Llamas*, by engaging in direct dialogue with the ICJ and indirect dialogue with foreign courts and legal systems about the U.S. adversarial system and how it functions as compared to the inquisitorial system seen elsewhere in the world, evidences the emergence of a conservative alternative approach to transnational judicial dialogue.[35] Under this approach, Professor Waters notes that an important goal of this movement is a uniformity in treaty interpretation as seen across parties to a given agreement.[36] This could indicate that Roberts has a certain degree of openness to the smooth incorporation of international legal principles in U.S. law more broadly.

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[31] Walton, *supra* note 23, at 423. Walton argues that this means that Chief Justice Roberts believes in adhering to conservative principles like judicial deference, strict separation of powers, federalism, and preservation of sovereignty, but with a light to "the practical effects of the holding of the case" such as the decision's effects on other institutional actors in their "ability to carry out their legitimate functions in American democracy," the impact of the decision on public perceptions of the Court, and the importance of keeping the Court from being the final arbiter on contentious political issues. *Id.* at 423–24.
[32] *Id.* at 406, 411.
[33] *Id.* at 416.
[34] *Id.* at 419–20.
[35] Melissa A. Waters, *Treaty Dialogue in Sanchez-Llamas: Is Chief Justice Roberts a Transnationalist, After All*, 11 LEWIS & CLARK L. REV. 89, 91–92 (2007).
[36] *Id.* at 92.

During his 2005 confirmation hearing, Roberts explained his view that foreign judges cannot bind American parties because no party accountable to the American people appointed the judge who made the ruling, unlike how U.S. federal and state judges are appointed.[37] Roberts also expressed his concern about the potential for federal judges being able to expand their discretion by "being able to pick and choose foreign law for support."[38] However, as Professor Penny M. Venetis indicates, Roberts never referenced international law during his confirmation hearing, but rather only foreign law.[39] Thus, there are still some unanswered questions as to how Chief Justice Roberts views the role of international law, meaning that the best course of action is to look to his opinions on the matter and to his concern for maintaining institutional legitimacy by ruling narrowly when he is able.

In sum, Roberts's vote will not be easy to obtain for those litigating to support the role of international law in federal courts, but the possibility exists. He is not completely averse to the idea of international law playing a role in federal courts. However, as his views on treaty law indicate, he remains a skeptic on the matter. As Roberts tends to move slowly and pragmatically in advancing his jurisprudential views,[40] litigants would do well to look to a more "small-c" conservative approach in incorporating CIL norms as a tool of statutory interpretation into federal question cases.

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[37] Penny M. Venetis, *The Broad Jurisprudential Significance of* Sosa v. Alvarez-Machain*: An Honest Assessment of the Role of Federal Judges and Why Customary International Law Can Be More Effective than Constitutional Law for Redressing Serious Abuses*, 21 TEMP. POL. & CIV. RTS. L. REV. 41 (2011).
[38] *Id.* at 95.
[39] *Id.* at 96.
[40] *See supra* note 31 and accompanying text; *see also* Brianne J. Gorod, *John Roberts and Constitutional Law*, 38 CARDOZO L. REV. 551, 552 (2016) ("[T]he Chief Justice's broader record … reveals a Justice who cares very much about the institutional legitimacy of the Court, institutional concerns that will sometimes lead him to put law over ideology in areas in which his ideological convictions are less firm."); Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137, 167–69 (arguing that Chief Justice Roberts's umpire metaphor signals his belief that a judge's role in the judiciary is to act to preserve the rule of law, which guarantees the "legitimacy" of American government).

IV. Keeping CIL Alive by Narrowing CIL- Based Statutory Interpretation Arguments

Litigants seeking to argue for statutory interpretation based on CIL face an uphill battle in persuading the Court to follow their lead, particularly given the current composition of the Court and the appointment of Justice Kavanaugh in particular. However, Chief Justice Roberts's focus on institutional legitimacy and his openness to well-defined notions of international law indicate that there are ways to ensure that the Court does not adopt the Kavanaugh model of CIL under *Erie*.

Given the challenges litigants face in maintaining and advancing the role of CIL in relevant statutory interpretation cases, litigants should use the following roadmap to incorporate CIL into their arguments. First, litigants should hew closely to norms permitted under the *Sosa* test in making their cases. Second, litigants should establish as a core part of their argument the historical precedent which indicates that the *Erie* Court never envisioned altering the use of CIL in statutory interpretation arguments by issuing the *Erie* decision, citing cases written by justices on the *Erie* Court to support this proposition. Third, litigants should cite other precedential cases incorporating international law, such as *Hamdan v. Rumsfeld*[41] and *Hamdi v. Rumsfeld*,[42] to establish the legitimacy and relevance of relying upon CIL norms in their cases.

Litigants arguing CIL norms should be cautious to stay within the bounds of *Sosa* rather than push the boundaries of what is permissible in federal court given Roberts's eye toward institutional legitimacy and his pivotal role in determining the role of CIL.[43] This means such norms should be as sufficiently well-defined as those norms which informed the passage of the ATS in the First Congress.[44] While a number of justices on the Court have questioned the

[41] 548 U.S. 557 (2006).
[42] 542 U.S. 507 (2004). Roberts took no part in the *Hamdi* opinion. *Id.* at 564.
[43] *See supra* Part III.
[44] *Sosa*, 542 U.S. at 724.

validity of the *Sosa* holding in terms of its embrace of CIL,[45] Roberts has yet to criticize *Sosa* as being wrongfully decided. Roberts even signed on to the majority opinion in *Jesner* holding that *Sosa* left the door to the use of ATS litigation cracked open.[46]

After establishing that the norm at issue is permitted under *Sosa*, litigants should reference the traditions of the *Erie* Court regarding CIL. This means utilizing CIL primarily to interpret the Constitution, treaties, and federal statutes for the sake of both clarifying and ensuring consistency in the application of the legal issue at bar.[47]

Lastly, litigants should look to other Supreme Court cases incorporating the CIL norms they wish to argue. For instance, for wartime habeas cases like *Al-Bihani*, *Hamdan* and *Hamdi* could prove particularly useful. *Hamdan* held that the military commissions at Guantanamo as they were then constituted violated the Uniform Code of Military Justice ("UCMJ") and the Geneva Convention.[48] Furthermore, the Court concluded that the structure of U.S. military commissions is to conform with CIL, including the Geneva Conventions of 1949.[49] The Court also held that nothing in the AUMF indicated that there was a Congressional intend to expand the scope of the military commissions beyond that of UCMJ Article 21.[50] Another seminal case in the "war on terror," *Hamdi* cites to the Third Geneva Convention to establish in a plurality opinion the law-of-war principle that detention cannot persist longer than the period of active hostilities.[51] The plurality also held that the AUMF, by granting the executive the authority to

[45] *See supra* note 4.
[46] 138 S.Ct. at 1398.
[47] See *supra* Section II.B.
[48] 548 U.S. at 567.
[49] *Id.* at 613 (citing Ex Parte Quirin, 317 U.S. 1, 28 (1942)).
[50] *Id.* at 593–94.
[51] 542 U.S. at 520.

use "necessary and appropriate force," included the authority to detain combatants and the like for the duration of the conflict on the basis of foundational law-of-war principles.[52]

Kavanaugh responded to this argument in his *Al-Bihani* concurrence by claiming that because the *Hamdi* plurality only addressed the fact that basic international law-of-war norms shape the fundamental practices of warfare, not the limits that international law may place on executive power, the case should be read narrowly as a general acknowledgement of presidential war power.[53] Kavanaugh also argued that while the case's opinion is a bit ambiguous, it would be unlikely for the *Hamdi* Court to make as broad a pronouncement as incorporating vague norms of international law into the interpretation of a war powers statute.[54] However, the proposal offered by this Note does not intend to incorporate supposedly vague notions of international law into a war powers statute. Rather, it seeks to incorporate well-established norms which pass the muster of *Sosa*. The Supreme Court does not appear to take issue with incorporating well-established CIL norms into domestic jurisprudence.

Looking to the precedent established by the *Erie* Court and the Roberts Court, as well as to other recent Supreme Court decisions involving international law—particularly *Sosa*, *Hamdi*, and *Hamdan*—litigants are well positioned to incorporate CIL norms into their statutory interpretation arguments in a way which could pass the muster of today's Court.

[52] *Id.* at 521.
[53] *Al-Bihani*, 619 F.3d at 43–44 (stating regarding the *Hamdi* plurality that, "As a practical matter, it would be quite odd to think that Congress, when passing the AUMF, did not intend to authorize at least what the international laws of war permit, subject of course to separate prohibitions found in domestic U.S. law.").
[54] *Id.* at 44.

Applicant Details

First Name	**Dominie**
Middle Initial	**H**
Last Name	**Burwell**
Citizenship Status	**U. S. Citizen**
Email Address	**dhb25@uakron.edu**
Address	**Address** Street **401 S Main St** City **Akron** State/Territory **Ohio** Zip **44311**
Contact Phone Number	**4807868873**

Applicant Education

BA/BS From	**Arizona State University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Akron School of Law** **http://www.uakron.edu/law/career**
Date of JD/LLB	**May 15, 2022**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Akron Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Genetin, Bernadette
genetin@uakron.edu
330/972-6939
Thomas, Tracy
thomast@uakron.edu
3309726617

References

Jon Little
(330) 252-6072
Jonathan_Little@ohnd.uscourts.gov

Tom Lyden
(330) 983-2569
tlyden@communitylegalaid.org
This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dominie Burwell
401 S Main St. Akron, OH 44311
Phone: 480-786-8873 | dhb25@uakron.edu

April 12, 2022

The Honorable Elizabeth W. Hanes, Magistrate
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

In reference to the upcoming law clerk position opening August 2022 please consider the enclosed application. I am in my third of law school at the University of Akron School of Law. I am confident you will find I am an ideal law clerk candidate because I am a talented legal writer and researcher, I have performed exceptionally well in law school, and I am committed to public service.

Throughout my law school career, I have received feedback from my professors that my writing style is well organized and clear. I have honed my writing skills in both academic and professional settings. I am a member of the *Akron Law Review* and polished my academic writing skills while writing my law review note. I was a member of the Akron Law Moot Court team in which I was able to refine my brief writing and research skills. This past summer I also was a summer associate with Community Legal Aid Services where I learned to write clear and concise motions to the court.

Further, I believe my academic performance in law school is indicative of my ability to perform as a highly effective staff attorney. I am currently ranked in the top 10% of my law school class. My academic performance was also acknowledged when I was chosen to be an Academic Success Fellow for Civil Procedure, where I was able to tutor first year students. I have not just limited my academic pursuits to the classroom. I was honored to be chosen as the Editor-in-Chief of the *Akron Law Review*. This experience helped me gain leadership and communication skills.

Finally, I have a commitment to public service. The two legal internships I participated in were at the Northern District of Ohio and Community Legal Aid Services. I have always been passionate about public service so my goal in law school was to use my advocacy skills to give back to the community. Last summer I also helped with Akron Law's Reentry Clinic which helps people convicted of crimes get pardons from the governor. I did not just limit public service to legal services but also as the Treasurer of the Law Association for Women I organized service

projects for the local community. The last three years have made me realize that my future is in public service.

I believe the experience I gained in law school will make me an excellent candidate for the position. My research and writing skills have prepared me for this experience. Further, my academic performance is indicative of my ability to produce high-quality work. I would perform just as exceptionally in this position as I have in law school. I am a team-player, a fast learner, and I am driven to succeed. Thank you for your consideration and, and I look forward to discussing my qualifications with you further.

Best Regards,
/s/ Dominie Burwell

Dominie Burwell
401 S Main St. Akron, OH 44311
Phone: 480-786-8873 | dhb25@uakron.edu

EDUCATION

The University of Akron School of Law, Akron, OH
Candidate for Juris Doctor, expected May 2022
Class Rank: Top 10%
GPA: 3.8
Honors: Akron Law Review, Editor-in-Chief (2021–2022); Assistant Editor (2020–2021)
Moot Court Honors Society (2020–2021)
Honors Program, Fellow (2019–present)
Board of Trustees Scholarship (2019–present)
Activities: Inclusion, Diversity, & Equity Taskforce (2021–2022)
Treasurer, Law Association for Women (2020–2021)

Arizona State University, Tempe, AZ
Bachelor of Arts in History and English Literature, *cum laude*, May 2015
GPA: 3.57
Honors: Dean's List (2012–2014)
New American University Merit Scholarship (2012–2015)
Alpha Lambda Delta–Phi Eta Sigma National Honor Society (2013–2015)
Study Abroad: Oxford University, Summer 2013

LEGAL EXPERIENCE

Community Legal Aid Akron, Ohio
Summer Associate, Family Law Project Summer 2021

- Interviewed clients for intake paperwork.
- Researched legal issues related to protective orders, domestic violence, and custody.
- Participated in protective order hearings.

Reentry Clinic, University of Akron Law School Akron, Ohio
Student Fellow Summer 2021

- Handled expedited pardons, sealing, and other reentry clinic applications.
- Conducted background searches.
- Interviewed clients to recommend the correct program for their needs.

Center for Constitutional Law, University of Akron Law School Akron, Ohio
Research Fellow 2020–2021

- Reviewed and edited articles for the ConLawNOW Journal.
- Researched judicial opinions of Judge Florence Allen, for articles and a book on first woman federal appellate judge.
- Hosted forums for students & faculty to discuss current constitutional issues.

Academic Success Program, University of Akron Law School Akron, Ohio
Civil Procedure Fellow 2020–2021

- Held weekly sessions for civil procedure students to reinforce key topics.
- Taught test taking and essay writing strategies.

Northern District of Ohio, Chamber of Judge John R. Adams Akron, Ohio
Legal Extern Summer 2020

- Researched legal issues related to open motions and upcoming cases.
- Drafted habeas corpus opinions and summary judgment opinions.
- Observed pretrial conferences.

Directory information is currently restricted.

Name: Dominie Burwell
Student ID: 4739167

Institution Info: The University of Akron
302 Buchtel Common
Akron, OH 44325
Institution ID: 003123
Birthdate: 08-14-xxxx
Student Address: 401 S Main St
#P10A
Akron, OH 44311
Print Date: 01/06/2022

Requestor: Dominie Burwell

Academic Program History

Program: Law School Full-time Program
11/08/2018: Applicant
11/08/2018: Law Major

Program: Law School Full-time Program
11/08/2018: Admitted
11/08/2018: Law Major

Program: Law School Full-time Program
03/29/2019: Active in Program
03/29/2019: Law Major

Beginning of Law Record

2019 Fall

Course	Description	Attempted	Earned	Grade	Points
9200 601	Civil Procedure - Fed Juris	3.000	3.000	A-	11.100
9200 609	Fundamentals of Lawyering	0.000	0.000	CR	0.000
Course Attributes:	Professional Masters and Professional I Classroom: Lecture / Rec.				
9200 611	Contracts	4.000	4.000	A	16.000
9200 619	LARW I	3.000	3.000	A	12.000
9200 625	Torts	4.000	4.000	A	16.000
Term GPA	3.936 Term Totals	14.000	14.000		55.100
Cumulative GPA	3.936 Cumulative Totals	14.000	14.000		55.100

2020 Spring

Course	Description	Attempted	Earned	Grade	Points
9200 602	Civil Procedure - Fed Litiga	3.000	3.000	CRX	0.000
9200 607	Criminal Law	3.000	3.000	CRX	0.000
9200 620	LARW II	3.000	3.000	CRX	0.000
Course Attributes:	Professional Law, Professional I Classroom: Lecture / Rec.				
9200 645	Property	4.000	4.000	CRX	0.000
9200 676	Legislation and Regulation	2.000	2.000	CRX	0.000
9200 708	Honors Seminar	2.000	2.000	CRX	0.000
Term GPA	0.000 Term Totals	17.000	17.000		0.000
Cumulative GPA	3.936 Cumulative Totals	31.000	31.000		55.100

2020 Summer

Course	Description	Attempted	Earned	Grade	Points
9200 669	UCC-Sales	3.000	3.000	A	12.000
Course Attributes:	Professional Masters and Professional I 100% Online Real-time (Synchronous) Instruction				
9200 696	Externship Program	2.000	2.000	CR	0.000
Course Attributes:	100% Online Asynchronous and Real-time				
Term GPA	4.000 Term Totals	5.000	5.000		12.000
Cumulative GPA	3.947 Cumulative Totals	36.000	36.000		67.100

2020 Fall

Course	Description	Attempted	Earned	Grade	Points
9200 603	Const Law: Govt Authority	3.000	3.000	A-	11.100
9200 608	Evidence	3.000	3.000	A-	11.100
9200 618	Advanced Legal Research	1.000	1.000	A-	3.700
Course Attributes:	100% Online Asynchronous instruction				
9200 622	Administr of Criminal Justice	3.000	3.000	A	12.000
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 688	Legal Drafting	2.000	2.000	A	8.000
Course Attributes:	Law, Professional I				
9200 695	Moot Court	1.000	1.000	CR	0.000
Course Attributes:	Professional Masters and Professional I Classroom: Lecture / Rec.				
9200 719	21st Century Litigation	3.000	3.000	A-	11.100
Course Attributes:	Professional Masters and Professional III 100% Online Real-time (Synchronous) Instruction				
Term GPA	3.800 Term Totals	17.000	17.000		57.000

Directory information is currently restricted.

Name: **Dominie Burwell**
Student ID: **4739167**

Cumulative GPA	3.878 Cumulative Totals	53.000	53.000		124.100

2021 Spring

Course	Description	Attempted	Earned	Grade	Points
9200 604	Const Law: Individual Rights	3.000	3.000	B	9.000
9200 612	Professional Responsibility	3.000	3.000	A-	11.100
9200 626	Business Associations	4.000	4.000	A-	14.800
Course Attributes:	Professional Masters and Professional I Classroom: Lecture / Rec. 100% Online Asynchronous instruction				
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 685	Wills, Trusts & Estates	4.000	4.000	A-	14.800
Course Attributes:	Professional Masters and Professional I Classroom: Lecture / Rec. 100% Online Real-time (Synchronous) Instruction				
9200 695	Moot Court	1.000	1.000	CR	0.000
Course Attributes:	Professional Masters and Professional I Classroom: Lecture / Rec.				

Term GPA	3.550 Term Totals	16.000	16.000		49.700
Cumulative GPA	3.778 Cumulative Totals	69.000	69.000		173.800

2021 Summer

Course	Description	Attempted	Earned	Grade	Points
9200 642	Alternative Dispute Resolution	3.000	3.000	A-	11.100
Course Attributes:	Professional Masters and Professional I 100% Online Asynchronous and Real-time				
9200 709	Reentry Clinic	2.000	2.000	CR	0.000

Term GPA	3.700 Term Totals	5.000	5.000		11.100
Cumulative GPA	3.773 Cumulative Totals	74.000	74.000		184.900

2021 Fall

Course	Description	Attempted	Earned	Grade	Points
9200 613	Pro Bono Service Requirement	0.000	0.000	CR	0.000
9200 638	Family Law	3.000	3.000	A-	11.100
Course Attributes:	100% Online Real-time (Synchronous) Instruction				
9200 658	Law Review Editorial Board	2.000	2.000	CR	0.000
Course Attributes:	Professional Masters and Professional I Individual Study				
9200 667	Substantial Skills	3.000	3.000	A	12.000
Course Topic:	Subst Skill:Draft for Estates				
Course Attributes:	Professional Masters and Professional I				
9200 684	Sem: Selected Legal Problems	3.000	3.000	A	12.000
Course Topic:	Sem: Social Justice				
9200 690	Trial Advocacy I	3.000	3.000	A	12.000

Term GPA	3.925 Term Totals	14.000	14.000		47.100
Cumulative GPA	3.803 Cumulative Totals	88.000	88.000		232.000

2022 Spring

Course	Description	Attempted	Earned	Grade	Points
9200 629	Secured Transactions	3.000	0.000		0.000
9200 658	Law Review Editorial Board	2.000	0.000		0.000
9200 668	Remedies	3.000	0.000		0.000
Course Attributes:	100% Online Asynchronous instruction				
9200 718	MBE Skills for the Bar Exam	1.000	0.000		0.000
Course Attributes:	Professional Masters and Professional I				
9200 722	3L Extended Bar Review Course	3.000	0.000		0.000
Course Attributes:	Professional Masters and Professional I 100% Online Asynchronous instruction				

Term GPA	0.000 Term Totals	12.000	0.000		0.000
Cumulative GPA	3.803 Cumulative Totals	100.000	88.000		232.000

Law Career Totals Cumulative GPA:	3.803 Cumulative Totals	100.000	88.000		232.000

Other Institutions Attended
Arizona State University
Fin Assistance-Stu Svcs Bldg
Tempe, AZ 85287

External Degrees

Directory information is currently restricted.

Name: **Dominie Burwell**
Student ID: **4739167**

Arizona State University
Bachelor of Arts 05/11/2015

----- End of Transcript ----

April 12, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I'm writing to recommend Dominie Burwell for a federal clerkship. Dominie did an excellent job in the classes in which I taught her and in the remainder of her coursework, has taken on leadership roles in co-curricular law school activities, and has the skills and maturity to handle the many tasks required of a federal clerk.

I have known Dominie since Fall 2019 when she was a beginning law student in my first semester Civil Procedure course. Since that time, Dominie has taken three federal procedural courses from me: Civil Procedure I (now titled Civ Pro, Federal Jurisdiction); Civil Procedure II (now titled Civ Pro, Federal Litigation); and an advanced federal procedural course, which is entitled 21st Century Litigation. Dominie was a top student in each class. She has a talent for federal procedural issues and quickly learned even the most complex civil procedure issues. Correspondingly, she excels in statutory and rule construction, and moving between the different legal sources that are important in federal procedural work – the Constitution, statutes, federal rules, and case law. Further, although Dominie received a grade of "Credit" for the Civil Procedure, Federal Litigation course, that was because Akron Law determined to issue only grades of "Credit" for the spring 2020 semester in which the school moved from in-person to online instruction. Dominie's work in the course was, however, excellent. She seamlessly made the transition to online instruction, worked extremely hard, and performed extremely well on the final exam. Because of her facility with the subject matter and her ability to handle tasks with minimal instruction, I asked Dominie to serve as the Academic Success Fellow for my Civil Procedure sections in the 2020-2021 academic year. In this position, Dominie reviewed civil procedure concepts and problems with my first-year students on a weekly basis. Dominie's work in this position was also excellent. Because of Dominie's strength in federal procedural issues and her strong overall academic performance, I believe Dominie would be an excellent federal law clerk.

Additionally, Dominie has taken on important leadership roles in co-curricular and extracurricular activities at Akron Law. Of particular importance, Dominie was selected by the outgoing Akron Law Review Board to be the next Editor in Chief of the Akron Law Review. This selection recognizes Dominie's strengths in organization and leadership skills, her strong standing among the supervising law review students and among her peers, and her skills in writing, editing, and balancing multiple tasks. Dominie has also served as on the Moot Court Honor Society, as Treasurer for the Law Association for Women, and, as noted above, as the Academic Success Fellow for my Civil Procedure courses. Dominie has not only performed at a high level at Akron Law, but has done so while being actively involved in the life of the law school. Dominie's strengths in organization, leadership, writing, and editing would also make her a fine law clerk.

Finally, Dominie is a pleasure to work with. She is poised, practical, well-organized, and independent. She also demonstrated a good sense of when to check with me, as her supervising professor, before moving forward.
I, thus, provide my highest recommendation to Dominie Burwell to serve as a law clerk. Please feel free to contact me at 330-972-6939 or genetin@uakron.edu if you have additional questions.

Very truly yours,

Bernadette Bollas Genetin
Professor Bernadette Bollas Genetin
C. Blake McDowell, Jr. Professor of Law
The University of Akron School of Law
Akron, OH 44325-2901
(330) 972-6939
genetin@uakron.edu

April 12, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Dominie Burwell for a federal judicial clerkship. I highly recommend Dominie for a clerkship and believe she would be an excellent candidate for this position. Dominie has outstanding analytical and research skills, high intellectual engagement, and strong legal writing, all making her particularly well-suited for a clerkship.

I am familiar with many of the qualities that are of interest for a judicial clerk based on my own experience as a judicial clerk for Judge Ferdinand F. Fernandez on the United States Court of Appeals for the Ninth Circuit. I practiced law as a litigator at Covington & Burling in Washington, D.C., handling federal court cases in business, antitrust, and civil rights prior to entering academia. I have taught at The University of Akron School of Law for twenty-three years, and am currently the Seiberling Chair of Constitutional Law and Director of the Center for Constitutional Law.

Dominie served as a constitutional law fellow in the Center for Constitutional Law, where I supervised her work. She is one of the best fellows I have had in the program. She worked as a research assistant, doing legal and historical archival work. In addition, Dominie worked as an editor for the Center's ConLawNOW online journal, editing the work published there. Her research and written work was exemplary, thoughtful, timely, and always moved the project forward. Thus, it is not surprising that she has now been chosen as Editor-in-Chief of the Akron Law Review. Furthermore, Dominie also exhibited good initiative in organizing and leading discussions with students and faculty in Center lunchtime programs on current issues of constitutional law, such as voting. Here, she took the lead in conducting difficult and complex discussions to help educate students on emerging and evolving issues of public import. Her quiet demeanor supported these scholarly discussions, and also facilitated good collaboration and professionalism among the fellows.

In my view, Dominie's blend of intellectual capabilities, exemplary analytical work, and strong work ethic make her an excellent candidate for a judicial clerkship position. Please let me know if I can provide any further information.

Sincerely,

/s/ Tracy A. Thomas

Professor Tracy A. Thomas
Seiberling Chair of Constitutional Law The University of Akron School of Law
Akron OH 44325-2901
(330) 972-6617
thomast@uakron.edu

The attached writing sample is an example of a habeas corpus opinion I wrote during my externship with the Northern District of Ohio. The writing is entirely my own.

The citation style is Bluebook.

This matter is before the Court on Petitioner's objections to the Magistrate Judge's Report and Recommendation ("R+R") filed October 19, 2018. (Doc. 18). For the following reasons, all of Petitioner's objections are OVERRULED. This Court ADOPTS the Report and Recommendation of the Magistrate Judge and DISMISSES Petitioner's Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254.

I. FACTS

On April 14, 2014, in Mahoning County Common Pleas Court, a jury convicted Petitioner of one count of aggravated robbery and one count of aggravated murder, both with firearm specifications. (Doc. 18 at 2). Petitioner then made a timely appeal to the Seventh District Court of Appeals with two assignments of error: (1) trial court erred in jury instructions about polygraph admission and (2) trial court erred in admitting polygraph evidence under Evidentiary Rule 702. (Doc. 18 at 3). On February 10, 2016 the Seventh District Court of Appeals affirmed Petitioner's conviction. (Doc. 18 at 3).

Petitioner then filed an appeal with the Ohio Supreme Court which the Supreme Court declined to accept jurisdiction of the appeal. (Doc. 18 at 3). While Petitioner's direct appeal was pending, Petitioner filed a timely petition to vacate or set aside his conviction or sentence. (Doc. 18 at 4). In the post-conviction petition, Petitioner claimed his history of mental health issues should have prevented the

polygraph examination and due to this his Sixth and Fourteenth Amendment rights to due process were denied. (Doc. 18 at 4).

The State filed a motion to dismiss and the trial court granted it. (Doc. 18 at 4). Petitioner did not appeal the dismissal (Doc. 18 at 4). He filed his Petition for Habeas Corpus in October 2017 and raised one ground for relief. (Doc. 18 at 4). Petitioner asserts that the trial court erred plainly in allowing into evidence a stipulated polygraph when there was no basis under Evidentiary Rule 702 and as a result his Fifth and Fourteenth Amendment rights were violated. (Doc. 18 at 4).

II. STANDARD OF REVIEW

If a party files written objection to a magistrate judge's report and recommendation, a judge must perform a *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or part, the findings or recommendations made by the magistrate judge." 28 U.S.C § 636(b)(1)(C).

III. LAW AND ANALYSIS

a. Procedural Default

Petitioner argues that the Magistrate Judge was incorrect in concluding that petitioner's claim was procedurally default. (Doc. 23 at 1-3).

Procedural default can occur in two ways. The first type of procedural default occurs when the petitioner fails "to observe a state procedural rule." *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). *Maupin* lays out a four-step test to determine if the petitioner failed to observe a state procedural rule:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and the petitioner failed to comply with the rule . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitution claim . . . [Finally,] the petitioner must demonstrate . . . that there was "cause" for him to not to follow the procedural rule and that he was adequately prejudiced by the alleged constitutional error.

Maupin, 785 F.2d at 138.

Second, default also occurs if a petitioner fails "to raise a claim in state court, and pursue that claim through the state's ordinary appellate review procedures." *Thompson v. Bell*, 580 F.3d 423, 437 (6th Cir. 2009) (quoting *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)) (internal citations and quotations omitted). Therefore, if a petitioner does not "raise a claim on direct appeal, which could have been raised on direct appeal, the claim is procedurally defaulted." *Williams* 460 F.3d at 806.

i. *Maupin Test*

Turning to the *Maupin* test, this Court agrees with the Magistrate Judge's conclusion that Petitioner's claim was procedurally defaulted when he failed to make a contemporaneous objection to admission of polygraph evidence. For the first prong of the *Maupin* test, the Ohio contemporaneous objection rule applied to

Petitioner because he did not object to the admission of polygraph evidence. (Doc. 18 at 9). Further, Petitioner stipulated to the admission of the polygraph evidence so there was no error when admitting the evidence. (Doc. 18 at 2).

Second, Petitioner argues that because the appellate court reviewed the appeal for plain error, procedural default had been waived. However, "a state court's plain error analysis does not save a petitioner from procedural default." *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir 2006). If the appellate court overlooks the procedural defect and allows a review for plain error it does not excuse Petitioner's failure to preserve his objections for appeal. Third, Ohio's contemporaneous objection rule is an "adequate and independent" ground on which a state can deny habeas corpus relief (Doc 18 at 10).

The last prong of the *Maupin* test requires that Petitioner must show there was cause for not following the procedural rule and that actual prejudice occurred as a result. There is no cause when "absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel." *Reed v. Ross*, 468 U.S. 1, 13, 104 S. Ct 2901, 82 L.Ed.2d 1 (1984). Petitioner did not contemporaneously object to the admission of his polygraph examination because Petitioner and his counsel had already stipulated the admission. This was a tactical decision by his counsel and Petitioner is now bound to that decision.

Finally, Petitioner did not demonstrate actual prejudice. For a showing of prejudice the petitioner must show "not merely that the error at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial

disadvantage, infecting his trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). At trial the jury heard from multiple witnesses including the polygraph examiner and Petitioner's attorney was able to cross-examine the witnesses (Doc. 18 at 2). Petitioner's objections do not demonstrate that prejudice occurred with the polygraph evidence and as a result his entire trial was infected with error that worked to his actual and substantial disadvantage.

ii. Exhaustion

The second type of procedural default occurs when the petitioner fails to exhaust his state court remedies. *Picard v. Conner*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). Once a petitioner has "fairly presented" his federal claim to state courts "the exhaustion requirement is satisfied." *Id.* A claim is fairly presented "if the petitioner asserted both the factual and legal basis for his claim to the state courts. *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir 2000). Petitioner claims his right to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments were violated by the admission of polygraph evidence. (Doc. 23 at 1).

However, Petitioner's direct appeal only claimed that jury instructions and admission of polygraph evidence violated Ohio law. While there might be constitutional undertones to the assignments of error, if a petitioner makes "[g]eneral allegations of the denial of rights to a fair trial and due process" the claim has not been fairly presented to the state court. *McMeans* 228 F.3d at 681 (internal quotations omitted).

The first time Petitioner brought up a constitutional issue before his habeas corpus petition was in his post-conviction petition to have his sentence or conviction vacated. Petitioner claimed his history of mental health should have prevented the polygraph exam and as a result his Sixth and Fourteenth Amendment rights were violated. The post-conviction petition was denied and there is no record Petitioner appealed. Petitioner's constitutional claims were only presented to the state court once and never appealed, therefore the claims were not exhausted. Because he never fairly presented a federal law claim to the state court, his claim has not been exhausted and therefore is procedurally defaulted.

b. Merits

Petitioner claims that improper admission of polygraph evidence and the inability to fully confront the polygraph examiner invalidated his constitutional rights.

Habeas corpus can only be granted when a state conviction is contrary to or an unreasonable application of federal law. *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S.Ct. 1945, 146 L.Ed.2d. 389 (2000). The Supreme Court has held "[i]ndividual jurisdictions therefore may reasonably reach different conclusions as to whether polygraph evidence should be admitted." *United States v. Scheffer*, 523 U.S. 303, 312, 118 S.Ct. 1261, 140 L.Ed.2d. 413 (1998). Admissibility of polygraph evidence is determined by individual state law. The Magistrate Judge determined

the Ohio court did not violate a federal right determined by the Supreme Court. (Doc 18 at 13).

If a federal Constitutional right has not been violated then habeas corpus can also be granted if a "state's evidentiary rule has resulted in has resulted in denial of fundamental fairness, thereby denying due process." *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). During Petitioner's trial, his attorney was given the opportunity to cross-examine the polygraph examiner after stipulating to the admission of the polygraph examination. (Doc. 18 at 13-14). Petitioner had his Sixth Amendment right to confront the witness therefore he was not denied fundamental fairness. Because Petitioner had the opportunity to confront the polygraph examiner his due process was not violated.

IV. Conclusion

This Court finds no merit to the objections raised by Petitioner. Therefore, Petitioner's objections are OVERRULED. This Court ADOPTS the Magistrate Judge's Report and Recommendation and the Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED.

Applicant Details

First Name	**Joseph**
Middle Initial	**E**
Last Name	**Bush**
Citizenship Status	**U. S. Citizen**
Email Address	**jebush@johnmarshall.edu**
Address	**Address** Street **1007 Clover Leaf Dr** City **McDonough** State/Territory **Georgia** Zip **30252** Country **United States**
Contact Phone Number	**8644205740**

Applicant Education

BA/BS From	**University of South Carolina-Upstate**
Date of BA/BS	**December 2006**
JD/LLB From	**Atlanta's John Marshall Law School** **https://www.johnmarshall.edu/**
Date of JD/LLB	**May 16, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**John Marshall Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

References

Sheryl Harrison-Mercer Associate Dean of Student Affairs sharrison-mercer@johnmarshall.edu
(678) 916-2681
Griffin Stocks gsstocks@johnmarshall.edu (912) 223-8676
Billy Todd
wrtodd@gmail.com
(678)860-4271

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Joseph E. Bush
1007 Clover Leaf Drive
McDonough, GA 30252
06/12/2021

The Honorable Elizabeth Wilson Hanes
United States District Judge
Unites States District Court, Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a 2022-2024 clerkship with your chambers. I am currently a 3L at Atlanta's John Marshall Law School in Atlanta, GA. My wife's family is from Virginia, specifically the Petersburg area. Virginia has always meant family and Thanksgiving to our family and the opportunity to live and work in Virginia makes the opportunity to work in your chambers very special. I aspire to sit on the bench one day myself and the opportunity to learn from your Honor while assisting you in chambers would be invaluable as a step along that path.

Enclosed please find my resume, a writing sample, my law school transcript, and my undergraduate transcript.

Please let me know if I can provide any additional information. I can be reached by phone at: (864)420-5740 or by email at jebush@johnmarshall.edu. Thank you very much for considering my application.

Respectfully,

Candidate for Juris Doctor 2022

JOSEPH BUSH

1007 Clover Leaf Drive, McDonough, GA 30252| 864-420-5740 | jebush@johnmarshall.edu

EDUCATION

Atlanta's John Marshall Law School — **Atlanta, GA**
Juris Doctor — *May 2022*
Class Rank: 2 of 31

University of South Carolina Upstate — **Spartanburg, SC**
Bachelor of Arts Degree: History — *December 2006*
Honors: President's List — *Fall 2005*

LEGAL EXPERIENCE

Solicitor General, Pam Bettis, Henry County Solicitor's Office — **McDonough, GA**
Legal Intern — *May 2021 – Present*

- Prosecuting Misdemeanor Bench and Jury Trials in the State Court of Henry County, GA
- Communicating with Defendants Counsel, Investigators, and Victims in Criminal Actions
- Assisting Staff Attorneys with Research into Issues of Georgia Law and Georgia Judicial Policy

The Honorable Judge Vincent Lotti, Henry County State Court — **McDonough, GA**
Legal Intern — *January 2021 – May 2021*

- Scheduling Cases, Checking Pretrial Requirements for Both In-Person and Virtual Proceedings
- Participating in Conferences with Counsel in Civil and Criminal Matters In-Person and Virtually
- Drafting, Researching, and Preparing Orders for Both Civil and Criminal Matters in the State Court of Henry County

SC Dept. of Social Services, CSED — **Greenville, SC**
Child Support Specialist — *October 2008 – February 2011*

- Working Directly with the Public to Establish Paternity, Child Support, and Medical Support Orders via Administrative Process in Anderson County Family Court
- Assisting Staff Attorneys by Drafting Special Orders for Enforcement Actions

PROFESSIONAL EXPERIENCE

Rockdale County Court Appointed Special Advocates — **Conyers, GA**
CASA Volunteer — *June 2018 – Present*

- Preparing CASA Reports for each court hearing, attend each court hearing.
- Advocating for the best interest of the children in foster care in Rockdale County, GA.
- Communicating with all parties to the case to ensure the needs of the child are being met.

LEGAL RESEARCH AND ACTIVITIES

JOHN MARSHALL LAW JOURNAL **Atlanta, GA**
Annual Symposium Editor *May 2021 – May 2022*

- Note: The Modernization of the Courtroom: Indirect Effects of a Global Pandemic

Associate Member *May 2020 – May 2021*

- Legislative Summary: House Bill 751: Anti-Red Flag – Second Amendment Conservation Act

June 12 2021 Sign Out

ATLANTA'S JOHN MARSHALL LAW SCHOOL

Transcript (Unofficial Copy)

000006405
Joseph Bush
1007 Clover Leaf Drive
McDonough, GA 30252

Date: 6/12/2021 8:22 AM

Dept	Course Section	Title	Grade	Repeat	Course Hours	Credit Attempt	Credit Earned	Quality Points	GPA
Fall 2019 ATL									
DAY	DD101D1	Legal Foundations/Academic Lab	P		1.0000	0.0000	1.0000	0.0000	
DAY	DD105A1	Civil Procedure I	B-		3.0000	3.0000	3.0000	8.0100	
DAY	DD110A1	Contracts I	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD120A1	Torts I	C+		3.0000	3.0000	3.0000	6.9900	
DAY	DD160A1	Criminal Law	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD204C1	Legal Writing, Research & Analysis I	B		3.0000	3.0000	3.0000	9.0000	
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Spring 2020 ATL									
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DAY	DD111A1	Contracts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD115A1	Real Property I	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD121A1	Torts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD205A1	LWRA II	CR		3.0000	0.0000	3.0000	0.0000	
		TERM TOTALS:				**0.0000**	**15.0000**	**0.0000**	**0.0000**
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DAY	DD155D1	Constitutionl Law I	B+		3.0000	3.0000	3.0000	9.9900	
DAY	DD170D1	Evidence	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD375D1	Wills, Trusts, and Estates	A-		3.0000	3.0000	3.0000	11.0100	
EVE	EE721E1	Constitutional Legal History	A-		3.0000	3.0000	3.0000	11.0100	
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		CLASS RANK:	**1 out of 34**						
Spring 2021 ATL									
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DAY	DD156D1	Constitutnl Law II	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD165B1	Criminal Procedure	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD206A1	Legal Writing, Research & Analysis III	B-		3.0000	3.0000	3.0000	8.0100	
DAY	DD675D1	Mastering Legal Principles I	A		3.0000	3.0000	3.0000	12.0000	
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CUMULATIVE:						**45.0000**	**61.0000**	**148.0200**	**3.2893**

Major: Law **College:** JD Program - Atlanta

End of Transcript

February 2 2021 Sign Out

ATLANTA'S JOHN MARSHALL LAW SCHOOL

Transcript (Unofficial Copy)

000006405
Joseph Bush
1007 Clover Leaf Drive
McDonough, GA 30252

Date: 2/2/2021 12:34 PM

Dept	Course Section	Title	Grade	Repeat	Course Hours	Credit Attempt	Credit Earned	Quality Points	GPA
Fall 2019 ATL									
DAY	DD101D1	Legal Foundations/Academic Lab	P		1.0000	0.0000	1.0000	0.0000	
DAY	DD105A1	Civil Procedure I	B-		3.0000	3.0000	3.0000	8.0100	
DAY	DD110A1	Contracts I	B		3.0000	3.0000	3.0000	9.0000	
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DAY	DD111A1	Contracts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD115A1	Real Property I	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD121A1	Torts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD205A1	LWRA II	CR		3.0000	0.0000	3.0000	0.0000	
		TERM TOTALS:				**0.0000**	**15.0000**	**0.0000**	**0.0000**
Fall 2020 ATL									
DAY	DD116D1	Real Property II	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD155D1	Constitutionl Law I	B+		3.0000	3.0000	3.0000	9.9900	
DAY	DD170D1	Evidence	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD375D1	Wills, Trusts, and Estates	A-		3.0000	3.0000	3.0000	11.0100	
EVE	EE721E1	Constitutional Legal History	A-		3.0000	3.0000	3.0000	11.0100	
		TERM TOTALS:				**15.0000**	**15.0000**	**53.0100**	**3.5340**
		CLASS RANK:	**1 out of 34**						
Spring 2021 ATL									
DAY	DD150D1	Business Orgs.			3.0000	0.0000	0.0000	0.0000	
DAY	DD156D1	Constitutnl Law II			3.0000	0.0000	0.0000	0.0000	
DAY	DD165B1	Criminal Procedure			3.0000	0.0000	0.0000	0.0000	
DAY	DD206A1	Legal Writing, Research & Analysis III			3.0000	0.0000	0.0000	0.0000	
DAY	DD675D1	Mastering Legal Principles I			3.0000	0.0000	0.0000	0.0000	
		TERM TOTALS:				**0.0000**	**0.0000**	**0.0000**	**0.0000**
CUMULATIVE:						**30.0000**	**46.0000**	**98.0100**	**3.2670**

Major: Law **College:** JD Program - Atlanta

End of Transcript

No. 21-0945

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Deon Snyder,

Appellant

v.

U.S. Bureau of Fiscal Service

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

Joseph E. Bush

500 New Jersey Avenue

Washington, D.C., 20011

(202)929-9710

ATTORNEY FOR THE APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

United States Supreme Court

United States Circuit Court of Appeals, District of Columbia Circuit

Statutes and Legislative History

STATEMENT OF JURISDICTION

This case asserts a claim pursuant to The Privacy Act of 1974, 5 U.S.C. § 552a(g)(1)(D)(2014). The Unites States District Court for the District of Columbia had subject matter jurisdiction over this matter pursuant to 5 U.S.C. § 552a(g)(5)(2014) (The Privacy Act of 1974) and 28 U.S.C.§ 1331, as the claim is a federal question. The United States Court of Appeals for the District of Columbia has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (1982) because this is an appeal of a final judgment in a civil case. The final Order was entered on the 8th day of December 2020. The Notice of Appeal was timely filed on December 8, 2020 pursuant to 28 U.S.C. § 2107.

STATEMENT OF THE ISSUES

I. Did the district court err in their determination that there was no issue of material fact regarding whether the release of personnel information which identified Mr. Snyder as the complainant in the Administrative Inquiry into the conduct of Ms. Ella Allen was a clearly unwarranted invasion of privacy, and thus protected under the Freedom of Information Act, 5 U.S.C. 552 Exemption 6? (Hereinafter FOIA.)

II. Did BFS violate the Privacy Act, 5 U.S.C. 552a, when they disclosed Mr. Snyder's information without his consent, after they wrongfully determined Exemption 6 of FOIA did not apply to the information sought by Mr. Rodriguez of Current News?

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

Because of the heinous invasion of his privacy which was triggered by the release of his personnel information by BFS, Mr. Deon Snyder filed suit against BFS pursuant to the Privacy Act of 1974 in the United States District Court for the District of Columbia. (R. at 2-4.) The Bureau of Fiscal Service timely answered, (R. at 9-11.) and moved for summary judgment. (R. at 12.) The trial court granted

the motion, holding that Mr. Snyder had failed to make a showing that the Bureau's disclosure of personnel information concerning Mr. Snyder was a clearly unwarranted invasion of his privacy, and therefore, was unlawful. (R. at 22.) This appeal followed. (R. at 23.) This Court certified the following question for appeal: "Whether the disclosure of personnel information concerning Mr. Snyder was a clearly unwarranted invasion of his privacy and thus a violation of the Privacy Act." (R. at 24.)

The Statement of the Facts

Deon Snyder was a loyal employee of the United States Bureau of Fiscal Service from February 2013 to May 2018. (R. 19:3.) On May 15, 2020, two years after Mr. Snyder left public service, Jorge Rodriguez sent a letter to BFS requesting release of information about the performance of Ms. Ella Allen, as well as the names and addresses of the employees whom Ms. Allen directly supervised. (R. at 5.) The Bureau complied with this request and tendered two documents to Mr. Rodriguez. (R. at 6.) The first document was a record of an administrative inquiry into Ms. Allen which was initiated by **REDACTED** Chief, Washington, D.C., Office, Department of Budget, Planning and Human Resources. (R. at 7.) The second was a list of employees whom Ms. Allen supervised while she was at BFS. (R. at 8.) This document listed Mr. Snyder's name lastly with the title Chief, Human Resources, below the names and ranks of three other employees. (R. at 8.)

Mr. Rodriguez contacted each of the listed employees that were supervised by Ms. Allen during her time at BFS. (R. at 13-14.) After contacting all the employees, Rodriguez forwarded the information he had received to a columnist, Karen Dennis. (R. at 14.) Upon receipt of the documents from Mr. Rodriguez, Ms. Dennis contacted Mr. Snyder in person at his workplace. (R. at 20.) On June 26, 2020 Current News published an article revealing Mr. Snyder as an "informant" and "whistleblower." (R. at 20.) Since the article was published, Mr. Snyder has been barraged at his home and workplace by calls and visits from reporters and subscribers of Current News. (R. at 20.) Because of these disruptions, Mr. Snyder was asked to take a leave of absence from his position as Assistant Director of Personnel for Silver Banking. (R. at 20.) The case below stemmed from the repeated intrusions into the peace and serenity of Mr. Snyder at both his home and his place of work.

The Standard of Review

This court reviews the grant or denial of summary judgment *de novo*, applying the same standard of review as that of the district court. "Summary judgment is appropriate only where there is 'no genuine issue as to any material fact' and, viewing the evidence in the light most favorable to the nonmoving party, 'the moving party is entitled to a judgment as a matter of law.'" *Maydak v. United*

States, 630 F.3d 166, 174 (D.C. Cir. 2010); *Palisades General Hospital v. Leavitt,* 426 F.3d 400, 403 (D.C. Cir. 2005).

SUMMARY OF THE ARGUMENT

The U.S. Bureau of Fiscal Service (BFS) failed to correctly apply FOIA Exemption 6 to protect the release of Mr. Snyder's name and other identifying information. There is no dispute that the documents released are the type of "personnel" files that satisfy the threshold requirement of Exemption 6, nor is there any dispute that the documents released pertain to Mr. Snyder. The dispute arises concerning whether Mr. Snyder had suffered a clearly unwarranted invasion of his privacy. Should Mr. Snyder suffer a clearly unwarranted invasion of his personal privacy, BFS would be in violation of the Privacy Act having disclosed Mr. Snyder's name and other identifying information in concert with information regarding an administrative inquiry into Mr. Snyder's former supervisor, Ms. Ella Allen.

The U.S. Bureau of Fiscal Service's argument that the information regarding Mr. Snyder's name and other identifying information was purely incidental to the release of information concerning Ms. Ella Allen is clearly erroneous because it fails to fully understand the purpose, scope, and application of Exemption 6 in protecting the privacy of private citizens from information in the possession of the

federal government. As this court has previously ruled, whistle-blowers, especially those who were promised anonymity, have a substantial privacy interest in controlling the release of their names and other identifying information. A significant public interest in the release of the information would be required to succeed in balancing against Mr. Snyder's substantial privacy interest in this information. The Bureau of Fiscal Service has failed to assert any significant public interest in Mr. Snyder's name and other identifying information that could possibly overcome Mr. Snyder's privacy interest in preventing the disclosure.

Without a significant stated public interest in Mr. Snyder's name and other identifying information, the balancing test of Exemption 6 will fall in favor of protecting that information from disclosure. Because BFS failed to protect the information under Exemption 6, they have violated the terms of the Privacy Act of 1974.

ARGUMENT AND CITATION OF AUTHORITY

I. This Court Should Reverse the District Court's Order and Judgment as Disclosure of Mr. Snyder's Name and Other Identifying Information by the United States Bureau of Fiscal Service (BFS) Constitutes a Clearly Unwarranted Invasion of Privacy Under FOIA, Therefore Disclosure of the Information by BFS is Prohibited by The Privacy Act of 1974.

The Freedom of Information Act was enacted in 1966 with the purpose of making available to the public the methods of operation, public procedures, rules,

policies, and precedents of every government agency. H.R. Rep. No. 1497, at, 22-23 (1966). The Freedom of Information Act generally requires federal agencies to disclose records in their possession upon request. 5 U.S.C. § 552(b)(2) (2016). Agencies are permitted to withhold records under Exemption 6 of FOIA, as well as other exemptions not applicable here. Exemption 6 provides that an agency is permitted to withhold "[P]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (2016).

The Privacy Act was enacted in 1974 to protect the privacy of individuals identified in government information systems by regulating the collection, maintenance, use, and dissemination of personal information and prohibiting unnecessary and excessive exchange of such information within the government and to outside individuals. H.R. Rep. No. 93–1416, p. 7 (1974). The Privacy Act of 1974 provides that:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be ... required under section 552 of this title [FOIA].

5 U.S.C. § 552a(b)(2). Where FOIA would permit withholding of information under any exemption, the Privacy Act of 1974 makes such withholding mandatory

upon an agency. *U.S. Dept. of Def. v. Fed. Lab. Rel. Auth.*, 510 U.S. 487, 502 (1994) (Hereinafter FLRA).

Exemption 6 of FOIA exempts from disclosure personnel, medical, and similar files the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 USC § 552(b)(6). In *Reporters Committee*, the Supreme Court provided a comprehensive analysis of the application of FOIA to information the federal government holds concerning individuals. Showing a disclosure is a clearly unwarranted invasion of privacy requires an individual to show first, that they had a significant or substantial privacy interest in the information disclosed, and finally that the individual's interest in privacy outweighed the public interest in disclosure of the information. *U.S. Dept. of J. v. Reporters Comm. For Freedom of Press,* 489 U.S. 749 (1989). The Supreme Court in *Reporters Committee* made clear Congress' giving of a broad meaning to the term "privacy" under FOIA. According to the Supreme Court "privacy" encompasses an individual's interest in "control[ling]… information concerning his or her person." *Id. at 763* Next, the Court clarified "public interest" indicating that only the furtherance of FOIA's core purpose of informing the public about "what their government is up to" can warrant the release of information implicating individual privacy interests. *Id. at 772-773*.

A. Mr. Snyder Had a Substantial Privacy Interest in Identifying Information Connecting Him to an Administrative Inquiry Regarding His Former Supervisor Ms. Ella Allen.

A substantial privacy interest is one that is "more than de minimis." *Natl. Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989)*. In *Horner,* the D.C. Court of Appeals held that whether a disclosure of information was a significant or a *de minimis* threat depends upon the characteristic revealed by virtue of being included in the disclosed information, and the consequences likely to ensue. *Id*. at 877. In *Horner*, the National Association of Retired Federal Employees (Hereinafter NARFE.) requested, pursuant to FOIA, the names, addresses, and annuitant status of persons who were added to the annuity rolls between April 1, 1981 and December 31, 1984. *Id*. at 874. The Office of Personnel Management (OPM) denied the request, invoking FOIA Exemption 6. *Id*. The NARFE's primary argument was that the planned use of the names and addresses of annuitants would not occasion significant annoyance to the annuitants. *Id*. at 875. The D.C. Court of Appeals held that the disclosure of the information on the list requested by NARFE would interfere with the subjects' expectations of undisturbed enjoyment in the solitude and seclusion of their own homes because any business or fund-raising organization for which such individuals might be

an attractive target would be able to use this information to target those individuals with "…an unwanted barrage of mailings and personal solicitations." *Id.* at 877. (Internal citation omitted.) The court determined that "such a fusillade cannot readily be deemed a *de minimis* assault on the privacy of those within." *Id.*

Horner addressed the release of names, addresses and annuitant status of former federal employees, Mr. Snyder's situation is similar. The information disclosed by BFS regarding Mr. Snyder was a list of the names of four chiefs at BFS whom Ms. Ella Allen supervised. (R. at 8.), and the redacted complaint listing the complainant as a chief at BFS. (R. at 7.) The characteristic revealed by the information disclosed was that Mr. Snyder was one of four possible complainants in the administrative inquiry into Ms. Ella Allen. The Court should determine that the release of that information would interfere with Mr. Snyder's expectation of undisturbed enjoyment of the solitude and seclusion of his home. Any media outlet interested in investigating Ms. Allen would use this information to contact the chiefs at BFS to question them about the administrative inquiry into Ms. Allen, both at their homes and their places of business. The barrage of personal solicitations for information

regarding the administrative inquiry cannot be deemed a *de minimis* assault on Mr. Snyder's privacy.

In addition, Mr. Snyder's identity as the complainant in an administrative inquiry gave him a heightened privacy interest in the information disclosed. The information released by BFS identified Mr. Snyder as one of four potential whistle-blowers in the administrative inquiry into Ms. Ella Allen. Mr. Snyder, as a complainant in an administrative inquiry, has a strong privacy interest in remaining anonymous because, as "whistle-blowers," they might face retaliation if their identities are revealed. *McCutchen v. U.S. Dept. of Health and Human Services*, 30 F.3d 183, 189 (D.C. Cir. 1994). "Where a person's fear of reprisals from the subject of his communication is reasonable ... privacy interests support the application of both Exemption 6 and Exemption 7(C)" *Id.* at 189. (Internal parenthesis and citation omitted.) In *McCutchen,* a scientist requested under FOIA "a list of all cases closed by the Office of Scientific Integrity." *Id.* at 185. The Department of Health and Human Services (HHS) withheld the names of the complainants alleging misconduct against scientists who were then investigated by the DHHS Office of Scientific Integrity. *Id.* The court held that the agency properly withheld the names of the complainants who initiated the

investigations as complainants have a strong privacy interest in remaining anonymous, citing to evidence in the record that one well-qualified immunologist was unable to obtain employment in her field after making allegations of misconduct. *Id*. at 189. Revelation as a "whistle-blower" could lead to professional and personal consequences of the type which Exemption 6 seeks to prevent, indicating that "employee-witnesses…have a substantial privacy interest." *Id*. at 190.

McCutchen addressed the direct disclosure of the identities of complainants. Mr. Snyder's situation here is similar. While Mr. Snyder's direct involvement in the administrative inquiry was redacted by BFS, (R. at 7.) the remaining information released allowed reasonable inferences to be made to determine that Mr. Snyder was indeed the complaining employee. (R. at 8.) Because there were only four possible individuals who could have been the complainant in Ms. Allen's Administrative Inquiry, it was quite easy for the identity of the actual complainant to be discerned. (R. at 14.) Because Mr. Snyder is a complainant, an employee-witness, in an internal investigation into misconduct, he would have a substantial privacy interest in the release of his identifying information connected to that investigation. *McCutchen* at 190. Further, the revelation of Mr. Snyder as a "whistle-blower" could lead to professional and

personal consequences, as he remains employed within the banking industry, (R. at 19.) an industry in which Ms. Allen continues to oversee in her position as Acting Assistant Secretary of Management within the Department of the Treasury. (R. at 3.)

Finally, when an interview is given after an assurance of confidentiality, it is an additional factor to be weighed in the privacy interest of an individual. *U.S. Dept. of State v. Ray*, 502 U.S. 164, 177 (1991). In *Ray*, an immigration attorney had requested documents containing information regarding Haitian nationals who attempted to emigrate illegally to the United States and were returned to Haiti. *Id*. at 168. These documents included interviews which had been conducted pursuant to an assurance of confidentiality. The names and other identifying information of individual Haitians were deleted from 17 of the documents, protecting the individuals from being contacted regarding their experience after returning to Haiti, because they had been given assurances of anonymity before they participated in the interviews. *Id* at The Supreme Court in *Ray* held:

> Not only is it apparent that an interviewee who had been given such an assurance might have been willing to discuss private matters that he or she would not otherwise expose to the public—and therefore would regard a subsequent interview by a third party armed with that information as a special affront to his or her privacy…

Id. at 177.

Applying *Ray* here, Mr. Snyder was assured confidentiality when he filed his complaint with BFS regarding Ms. Allen's alleged

misconduct. (R. at 16:14.) The policy of confidentiality was publicized by BFS. (R. at 16:27-30.) It was clear to upper management at BFS that Mr. Snyder would not have disclosed this information without the assurance of anonymity. (R. 16:16.). The purpose of the requested information was to contact and subsequently interview any employees of BFS who may know about Ms. Allen's administrative inquiry. Mr. Snyder would regard his subsequent interview by a third party armed with that information as a special affront to his privacy.

In conclusion, based on Mr. Snyder's general privacy interest in his name and identifying information, coupled with his status as a whistle-blower and his assurances of anonymity, Mr. Snyder should be found to have a substantial privacy interest in the release of his name and identifying information in connection with the administrative inquiry into Ms. Allen.

B. The Release of Mr. Snyder's Information Would do Nothing to Serve the Public Interest in Informing Citizens About the Operations of the Federal Government or the Agencies Thereof.

Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of FOIA. *Reporters Comm.* at 772. That purpose in not bolstered by the disclosure of

information concerning private citizens that reveals little or nothing about the agency's conduct. *Id.* The Supreme Court has held that the only relevant public interest is the extent to which disclosure of the information sought would "she[d] light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to." *U.S. Dept. of Def. v. Fed. Lab. Rel. Auth.*, 510 U.S. 487, 497 (1994) (Hereinafter FLRA.) (Internal citation omitted.) In *FLRA*, two local unions requested federal agencies provide them with the names and home addresses of the agency employees in the bargaining units represented by the unions. *Id.* at 490. The federal agencies disclosed the employee's names and workstations but refused to release home addresses on the grounds that the release of their addresses would constitute a clearly unreasonable invasion of their privacy which was not outweighed by the public interest in the address information *Id.* The Supreme Court held while the disclosure of the information sought would allow the requesting party to communicate more effectively with employees, it would not appreciably further "the citizens' right to be informed about what their government is up to." *Id.* at 497. (Internal citation omitted.)

Applying the holding in *FLRA* here, the disclosed information in question here is the ultimately the name of a complainant in an internal

administrative inquiry. The name of the subject of the inquiry, Ms. Allen, is of public interest due to her high rank in the government and later held offices, however, the name of the employee complainant, Mr. Snyder, would not grant the public knowledge regarding BFS itself, or how BFS conducts its statutory duties. Because the revelation of the name of a complainant in this Administrative Inquiry would shed no light on the statutory operations of the agency, that information would have negligible public interest.

C. Under the Balancing Test of Exemption 6, the Disclosure of Mr. Snyder's Information is a Clearly Unwarranted Invasion of Personal Privacy.

The necessity of balancing private and public interests under Exemption 6 has long been recognized. Regarding Exemption 6, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." *Dept. of A.F. v. Rose*, 425 U.S. 352, 372 (1976). In *Rose,* student editors or former student editors of the New York University Law Review were denied access by the Department of Air Force to case summaries of honor and ethics hearings with personal references and other identifying references deleted. *Id.* at 355. The Supreme Court agreed with the Court of Appeals which held that further inquiry was required and in camera inspection of the documents by the district court would "yield edited documents sufficient for

the purpose sought and sufficient as well to safeguard the affected persons in their legitimate claims of privacy." *Id*. at 358. The privacy interest implicated was "identification of disciplined cadets a possible consequence of even anonymous disclosure could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." *Id*. at 377. (Internal citation omitted.)

The Supreme Court, in their directions on remand to the district court, provided guidance regarding the determination of what constituted a "clearly unwarranted invasion of personal privacy", which would allow for the identifying information to be redacted, or if redaction were insufficient, the document could be withheld. *Id*. at 372. That guidance entailed the balancing of the privacy interest of the individual whose information was disclosed against the public interest in the disclosure of the information. *Id*. The device adopted to achieve that balance was the limited exemption for "clearly unwarranted" invasions of personal privacy. *Id*. The balancing test itself was defined, relying on the congressional record to shed light on the intent of the legislature. *Id*. The privacy side of the balancing test is broad and "encompasses all interests," weighing privacy not only from the viewpoint of the public, but also from the vantage of those who would have

been familiar with the information. *Id*. at 380. While the public side focuses on the basic purpose of FOIA "to open public business to public view." *Id*.

Applying the balancing test from *Rose* to the instant case, Snyder had a significant privacy interest in his name and identifying information being disclosed to the public in relation to the administrative inquiry into Ms. Ella Allen. Snyder's general privacy interest is bolstered by the strong interest in anonymity of whistle blowers, and those who have been promised confidentiality. These factors give substantial weight to Deon Snyder's privacy interest in the information disclosed by BFS to Mr. Rodriguez and Current News. The substantial weight of Mr. Snyder's privacy interest is balanced against a negligible public interest in the information disclosed. Mr. Snyder's name and position while he was employed with BFS does not disclose to the public any relevant information regarding the actions of BFS, or senior policy level employees, it sheds no light on the conduct of BFS with respect to its duties established by statute. Because there is practically no relevant public interest to be balanced against Mr. Snyder's privacy interest, the balance is clearly in favor of Mr. Snyder's privacy. *FLRA* at 500. Therefore, BFS should have redacted any information which would have connected Mr. Snyder's identity to that of the complainant in Ms. Ella Allen's Administrative Inquiry.

Appellee's may raise that privacy interests of a high-ranking policy-level public employees is diminished compared to the privacy interest of lower-level public employees as their actions as a "policy level" employee on the job would let the public know "what their government was up to." *Reporters Comm*. at 773. While Mr. Snyder was not a low-level government employee, he was far from the upper echelons of government which would rise to the level of "policy level employees." This is evidenced by individuals who were in supervisory positions over Mr. Snyder, namely Ms. Allen, (R. at 15.) and over Ms. Ella Allen, Deputy Director Cohen (R. at 15.) While the title of chief may sound high up the chain of command, it is not so high as to lower his expectation of privacy with respect to the information released to Mr. Rodriguez of *Current News*. Even if Mr. Snyder's position is found to diminish his privacy interest, even that diminished interest, when balanced against the non-existent public interest put forward by BFS, would still prevail.

Further, Appellee's may raise that the type of harm Mr. Snyder was subjected to was purely speculative at the time of the release of the information, pointing to the redaction of his name on the Administrative Inquiry (R. at 7.) and the fact that nothing in the second document directly connects him to the Administrative Inquiry. (R. at 8.). This is correct

reasoning yet is not correctly applied to the case at bar. To justify the withholding of information under Exemption 6, it must be shown that the threat to an individual's privacy must be real, not speculative. *Rose* at 380. In *Rose,* the Supreme Court pointed out that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities. *Rose* at 380 n. 19.

Applying the Supreme Court's reasoning in *Rose* here, the contention that the harm suffered by Mr. Snyder was purely speculative at the time the information was released is irrelevant. While Mr. Snyder is not an Air Force officer whose career could be harmed should his involvement in an honor or ethics hearing be revealed to the world, he was a complainant in an Administrative Inquiry into possible misconduct by his supervisor Ms. Ella Allen, a high-level employee in the Department of the Treasury, which oversees the banking industry. (R. at 13.) This court pointed out in *McCutchen*, there is a real, palpable threat to the privacy of a whistleblower in the disclosure of their identity to the world at large. *McCutchen* at 189. This court held in *McCutchen*, whistleblowers, like Mr. Snyder, have a strong privacy interest in remaining anonymous due to the likelihood of retaliation should their identities be revealed. *Id*. Because Mr. Snyder is still employed in the banking industry, over which Ms. Allen could hold

significant influence and power, maintaining his anonymity is of the utmost importance to Mr. Snyder. The type of privacy invasion suffered by Mr. Snyder; contact at his home (R. at 19.); and his place of work (R. at 20.) to inquire about the Administrative Inquiry into Ella Allen, is precisely the type of privacy invasion that Exemption 6 of FOIA is designed to prevent.

Where the privacy interest of an individual outweighs the negligible FOIA-related public interest in disclosure, the court should conclude that disclosure would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Freedom of Information Act does not require the release of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *Id.* As discussed above, BFS's disclosure of Snyder's information would constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6 of FOIA. When any Exemption would allow the withholding of information under FOIA, the Privacy Act makes the withholding of that information by an agency mandatory. *Fed. Lab. Rel. Auth* at 502. The release of Mr. Snyder's information is not required under FOIA, as discussed above, therefore the Privacy Act requires BFS to withhold the information. Because BFS failed to withhold information which would constitute a "clearly unwarranted invasion of personal

privacy," and thus be protected from disclosure under Exemption 6 of FOIA, BFS has clearly violated the Privacy Act. *Id*.

CONCLUSION

For all the foregoing reasons, Mr. Deon Snyder requests that this Court reverse the decision of the District Court's Order dated December 8, 2020 and remand this case to the District Court for trial on the merits.

Respectfully submitted this 21st day of March 2021.

__/s/_____
Joseph E. Bush
Counsel for Mr. Deon Snyder

No. 21-0945

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Deon Snyder,

Appellant

v.

U.S. Bureau of Fiscal Service

Appellee

CERTIFICATE OF SERVICE

This is to certify that I am counsel for Mr. Deon Snyder and that on this day I have served opposing counsel a copy of this Brief.

This 21st day of March 2021.

/s/_____

Joseph E. Bush

Counsel for Mr. Deon Snyder

Applicant Details

First Name	**Joseph**
Middle Initial	**E**
Last Name	**Bush**
Citizenship Status	**U. S. Citizen**
Email Address	**jebush@johnmarshall.edu**
Address	**Address** Street **1007 Clover Leaf Dr** City **McDonough** State/Territory **Georgia** Zip **30252** Country **United States**
Contact Phone Number	**8644205740**

Applicant Education

BA/BS From	**University of South Carolina-Upstate**
Date of BA/BS	**December 2006**
JD/LLB From	**Atlanta's John Marshall Law School** **https://www.johnmarshall.edu/**
Date of JD/LLB	**May 16, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**John Marshall Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

References

The Honorable Judge Timothy Hagan
Administrative Law Judge EEOC, Atlanta Hearings Unit
Sam Nunn Atlanta Federal Center
100 Alabama St SW, Atlanta, GA 30303
timothy.hagan@eeoc.gov
470-531-4828

The Honorable Judge Vincent Lotti
State Court of Henry County Georgia
One Judicial Center, Suite 330
McDonough, GA 30253
sydnyjones@co.henry.ga.us (This is Judge Lotti's Clerk, this is the best email for contact.)
(770) 288-7377

Jeffrey A. Van Detta (Wills Trusts and Estates, and Remedies Professor, Law Journal Faculty Advisor)
John E. Ryan Professor of International Business and Workplace Law, Professor of Law
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Robert D'Agostino (Business Organizations, and Sales and Secure Transactions Professor)
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Joseph E. Bush
1007 Clover Leaf Drive
McDonough, GA 30252
04/04/2022

The Honorable Elizabeth Wilson Hanes
United States District Judge
Unites States District Court, Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am writing to apply for the term law clerk position starting August 15, 2022. I am currently in my final semester at Atlanta's John Marshall Law School and will graduate on May 21, 2022. I plan to sit for the Georgia Bar July 26-27.

I was born and raised in the Upstate of South Carolina, spending most of my life in Easley, SC. A job opportunity for my wife took us away from home, and my family moved to Georgia in 2014. I spent our first five years in Georgia as a stay-at-home parent for our two children. Once our children entered school, I began to seek out opportunities to re-engage and help the people of our community. The drive to engage and help the people of my community led me to the study of law at Atlanta's John Marshall Law School.

While at Atlanta's John Marshall Law School, I enjoyed a level of success I had not anticipated. My success led to membership in the Atlanta's John Marshall Law Journal, and the position of Annual Symposium Editor. The Law Journal successfully organized and executed our symposium after a two-year hiatus due to COVID-19. Our symposium focused on the changes and best practices in mediation, arbitration and litigation moving through the COVID-19 pandemic. My experience on the Law Journal opened the possibility of a judicial clerkship, a career path I had not previously thought possible.

I have worked the last two semesters as a judicial extern with The Honorable Judge Timothy G. Hagan, Equal Employment Opportunity Commission, hearing federal sector employment discrimination cases. Working with Judge Hagan solidified my desire to clerk in the federal system.

I am very interested in the fast-paced varied environment provided by the chambers of a United States Magistrate Court Judge. The opportunity to work with your honor to preserve justice, promote the general welfare, and secure the blessings of liberty for the people of the United States of America would be one of the greatest honors of my life.

Please let me know if I can provide any additional information. I can be reached by phone at: (864)420-5740 or by email at jebush@johnmarshall.edu. Thank you very much for considering my application.

Respectfully,

Candidate for Juris Doctor 2022

JOSEPH BUSH

1007 Clover Leaf Drive, McDonough, GA 30252| 864-420-5740 | jebush@johnmarshall.edu

EDUCATION

Atlanta's John Marshall Law School **Atlanta, GA**

Juris Doctor *May 2022*

Class Rank: 2 of 31

University of South Carolina Upstate **Spartanburg, SC**

Bachelor of Arts Degree: History *December 2006*

LEGAL EXPERIENCE

The Honorable Judge Timothy Hagan, EEOC, Atlanta Hearings Unit **Atlanta, GA**
Legal Extern *August 2021-Present*

- *Drafting, Researching, Proofreading, Preparing, and Editing Opinions of the Court*
- *Evaluation of Evidence and Testimony*

Solicitor General, Pam Bettis, Henry County Solicitor's Office **McDonough, GA**
Legal Intern *May 2021 – August 2021*

- *Communicating with Defendants Counsel, Investigators, and Victims*
- *Prosecuting Bench and Jury Trials in the State Court of Henry County, GA*

The Honorable Judge Vincent Lotti, Henry County State Court **McDonough, GA**
Legal Intern *January 2021 – May 2021*

- *Scheduling Cases, Checking Pretrial Requirements*
- *Drafting, Researching, and Preparing Orders*

SC Dept. of Social Services, CSED **Greenville, SC**

Child Support Specialist *October 2008 – February 2011*

- *Drafted Special Orders for Enforcement and Administrative Actions.*

PROFESSIONAL EXPERIENCE

Rockdale County Court Appointed Special Advocates **Conyers, GA**

CASA Volunteer *June 2018 – Present*

- *Prepare CASA Reports for each court hearing, attend each court hearing.*
- *Advocate for the best interest of the children in foster care in Rockdale County, GA.*
- *Communicate with all parties to the case to ensure the needs of the child are being met.*

LEGAL RESEARCH AND ACTIVITIES

JOHN MARSHALL LAW JOURNAL **Atlanta, GA**

Annual Symposium Editor *May 2021 – May 2022*

- A Question of Power: Subpoenas Issued for Witnesses from a Distant Federal-Court Forum

February 13 2022 Sign Out

ATLANTA'S JOHN MARSHALL LAW SCHOOL

Transcript (Unofficial Copy)

000006405
Joseph Bush
1007 Clover Leaf Drive
McDonough, GA 30252

Date: 2/13/2022 3:23 PM

Dept	Course Section	Title	Grade	Repeat	Course Hours	Credit Attempt	Credit Earned	Quality Points	GPA
Fall 2019 ATL									
DAY	DD101D1	Legal Foundations/Academic Lab	P		1.0000	0.0000	1.0000	0.0000	
DAY	DD105A1	Civil Procedure I	B-		3.0000	3.0000	3.0000	8.0100	
DAY	DD110A1	Contracts I	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD120A1	Torts I	C+		3.0000	3.0000	3.0000	6.9900	
DAY	DD160A1	Criminal Law	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD204C1	Legal Writing, Research & Analysis I	B		3.0000	3.0000	3.0000	9.0000	
		TERM TOTALS:				**15.0000**	**16.0000**	**45.0000**	**3.0000**
Spring 2020 ATL									
DAY	DD106A1	Civil Procedure II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD111A1	Contracts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD115A1	Real Property I	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD121A1	Torts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD205A1	LWRA II	CR		3.0000	0.0000	3.0000	0.0000	
		TERM TOTALS:				**0.0000**	**15.0000**	**0.0000**	**0.0000**
Fall 2020 ATL									
DAY	DD116D1	Real Property II	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD155D1	Constitutionl Law I	B+		3.0000	3.0000	3.0000	9.9900	
DAY	DD170D1	Evidence	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD375D1	Wills, Trusts, and Estates	A-		3.0000	3.0000	3.0000	11.0100	
EVE	EE721E1	Constitutional Legal History	A-		3.0000	3.0000	3.0000	11.0100	
Dean's List		**TERM TOTALS:**				**15.0000**	**15.0000**	**53.0100**	**3.5340**
		CLASS RANK:	**1 out of 34**						
Spring 2021 ATL									
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DAY	DD156D1	Constitutnl Law II	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD165B1	Criminal Procedure	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD206A1	Legal Writing, Research & Analysis III	B-		3.0000	3.0000	3.0000	8.0100	
DAY	DD675D1	Mastering Legal Principles I	A		3.0000	3.0000	3.0000	12.0000	
Dean's List		**TERM TOTALS:**				**15.0000**	**15.0000**	**50.0100**	**3.3340**
		CLASS RANK:	**2 out of 31**						
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DAY	DD175D1	Profesnl Responsblty	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD270D1	Sem: Scholarly Legal Writing	I		2.0000	0.0000	0.0000	0.0000	
DAY	DD497D1	GA Practice/Procedure	B		2.0000	2.0000	2.0000	6.0000	
DAY	DD660D5	Externship	P		5.0000	0.0000	5.0000	0.0000	
DAY	DD665D1	Externship: Learning From Practice	P		1.0000	0.0000	1.0000	0.0000	
DAY	DD676D1	Mastering Legal Principles II	A-		3.0000	3.0000	3.0000	11.0100	
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		CLASS RANK:	**2 out of 33**						

Spring 2022

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DAY	DD185D1	Sales & Secured Transactions	3.0000	0.0000	0.0000	0.0000	
DAY	DD635B1	Mastering Legal Skills	3.0000	0.0000	0.0000	0.0000	
DAY	DD660D3	Externship	3.0000	0.0000	0.0000	0.0000	
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Major: Law **College:** JD Program - Atlanta

End of Transcript

February 2 2021 Sign Out

ATLANTA'S JOHN MARSHALL LAW SCHOOL

Transcript (Unofficial Copy)

000006405
Joseph Bush
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McDonough, GA 30252

Date: 2/2/2021 12:34 PM

Dept	Course Section	Title	Grade	Repeat	Course Hours	Credit Attempt	Credit Earned	Quality Points	GPA
Fall 2019 ATL									
DAY	DD101D1	Legal Foundations/Academic Lab	P		1.0000	0.0000	1.0000	0.0000	
DAY	DD105A1	Civil Procedure I	B-		3.0000	3.0000	3.0000	8.0100	
DAY	DD110A1	Contracts I	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD120A1	Torts I	C+		3.0000	3.0000	3.0000	6.9900	
DAY	DD160A1	Criminal Law	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD204C1	Legal Writing, Research & Analysis I	B		3.0000	3.0000	3.0000	9.0000	
		TERM TOTALS:				**15.0000**	**16.0000**	**45.0000**	**3.0000**
Spring 2020 ATL									
DAY	DD106A1	Civil Procedure II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD111A1	Contracts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD115A1	Real Property I	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD121A1	Torts II	CR		3.0000	0.0000	3.0000	0.0000	
DAY	DD205A1	LWRA II	CR		3.0000	0.0000	3.0000	0.0000	
		TERM TOTALS:				**0.0000**	**15.0000**	**0.0000**	**0.0000**
Fall 2020 ATL									
DAY	DD116D1	Real Property II	A		3.0000	3.0000	3.0000	12.0000	
DAY	DD155D1	Constitutionl Law I	B+		3.0000	3.0000	3.0000	9.9900	
DAY	DD170D1	Evidence	B		3.0000	3.0000	3.0000	9.0000	
DAY	DD375D1	Wills, Trusts, and Estates	A-		3.0000	3.0000	3.0000	11.0100	
EVE	EE721E1	Constitutional Legal History	A-		3.0000	3.0000	3.0000	11.0100	
		TERM TOTALS:				**15.0000**	**15.0000**	**53.0100**	**3.5340**
		CLASS RANK:	**1 out of 34**						
Spring 2021 ATL									
DAY	DD150D1	Business Orgs.			3.0000	0.0000	0.0000	0.0000	
DAY	DD156D1	Constitutnl Law II			3.0000	0.0000	0.0000	0.0000	
DAY	DD165B1	Criminal Procedure			3.0000	0.0000	0.0000	0.0000	
DAY	DD206A1	Legal Writing, Research & Analysis III			3.0000	0.0000	0.0000	0.0000	
DAY	DD675D1	Mastering Legal Principles I			3.0000	0.0000	0.0000	0.0000	
		TERM TOTALS:				**0.0000**	**0.0000**	**0.0000**	**0.0000**
CUMULATIVE:						**30.0000**	**46.0000**	**98.0100**	**3.2670**

Major: Law **College:** JD Program - Atlanta

End of Transcript

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ATLANTA DISTRICT OFFICE

JODY SEYMORE, Complainant, vs. ALEJANDRO MAYORKAS, SECRETARY DEPARTMENT OF HOMELAND SECURITY IMMIGRATION AND CUSTOMS ENFORCEMENT, Agency.	EEOC NO. 410-2020-00047X AGENCY NO. HS-ICE-01878-2018 DATED**: January 10, 2022**

Order Granting Agency Motion for
Summary Judgment and Entering Final Judgment

All prerequisites for requesting an EEOC hearing have been satisfied as set forth in the EEOC regulations at 29 C.F.R. § 1614.101, *et seq.,* which govern the administrative processing of federal sector complaints of employment discrimination.

I. Accepted Issues

Whether the Agency discriminated against the Complainant based on disability (physical) and retaliation (prior protected activity) when the following incidents occurred:

1. On or about May 9, 2018, Complainant was pulled from a training course at the Federal Law Enforcement Training Center (FLETC); and

2. Beginning on a date to be specified, and ongoing, management denied Complainant a reasonable accommodation when management failed to improve Complainant's working conditions in areas such as air quality and exposure to harmful chemicals.

Equal Employment Opportunity Commission Atlanta District Office 100 Alabama St., S.W., Suite 4R30 Atlanta, GA 30303-8704	Hon. Timothy G. Hagan Administrative Judge timothy.hagan@eeoc.gov Phone: (470) 531-4828

II. Procedural Background

The EEOC received Complainant's hearing request on September 9, 2019. The case was assigned to Timothy Hagan on June 8, 2020. On June 26, 2020, an Acknowledgment Order was entered. The Initial Conference commenced on 1/28/2021 and was continued, finally culminating on March 4, 2021. On March 4, 2021, a Case Management and Scheduling Order was entered Initial Conference. On June 23, 2021, the AJ revised the schedule via email as follows: Discovery Cutoff: July 12, 2021; Dispositive Motion Cutoff: July 27, 2021; Dispositive Motion Response: August 11, 2021. The Agency filed a timely motion for summary judgment. The Complainant did not respond, and his time has expired.

III. Findings of Fact

The Complainant is an Equipment Specialist (Ordinance) (ESO) for the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), in their Altoona Armory in Altoona, Pennsylvania. During the time relevant to the claims above, the Complainant's first-line supervisor was James Carmany, and then Charles Dittmer. His second-line supervisor was Robert Burgess, and his third-line supervisor was Kathleen Sweeny. Ms. Sweeny worked out of Fort Benning, GA and Washington, DC. The Complainant's fourth-line supervisor was David Evans. Mr. Evans worked out of Washington, DC.

The Complainant has worked Armory Operations Unit (AOU), Office of Firearms and Tactical Programs since 1998. The Complainant's duties include (1) inspecting, rebuilding, refinishing, modifying, and maintaining firearms, (2) testing firearms and ammunition, and (3) acting as a subject matter expert on firearms and ammunitions for management and vendors in the industry.

The Complainant was diagnosed with multiple sclerosis (MS) in March of 2017. Multiple sclerosis is an incurable disease in which an abnormal response of the body's immune system is directed against the central nervous system. The cause of MS is unknown. The Complainant properly notified his first- and second-line supervisors of his disability by providing them with medical documentation of his MS diagnosis on April 2, 2018.

Multiple sclerosis is explicitly listed under the EEOC regulations implementing the ADAAA as one of a handful of impairments "which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward." 29 C.F.R. § 1630.2(j)(4)(iv).

The Complainant states that he was subject to discrimination based on his physical disability and retaliation due to prior protected activity when he and three co-employees were pulled from a training course at the Federal Law Enforcement Training Center (FLETC), Fort Benning, GA on May 9, 2018. The Complainant has provided no evidence that he was treated differently than other similarly situated individuals who were not part of a protected class, rather, all evidence on the record points to the fact that the group of individuals was pulled from the course due to budgetary considerations, and as a result, the Complainant was treated precisely the same as the other three individuals from AOU who were in attendance. ROI at 237.

The Complainant states that he was subject to discrimination based on his physical disability and retaliation due to prior protected activity when, beginning on a date to be specified, and ongoing, management denied Complainant a reasonable accommodation when management failed to improve Complainant's working conditions in areas such as air quality and exposure to harmful chemicals.

The earliest date on which the Agency knew or could have known of the Complainants disability is March 20th of 2017, the date on which his diagnosis of Multiple Sclerosis was presented to the agency, as confirmed by Dr. Brett Scharf and Raphael Voltz. ROI at 103. Since this is the earliest date the Agency knew or could have known of the Complainants condition, this is the date on which any cause of action for failure to accommodate would accrue. Any issues regarding air quality prior to March 20th, 2017 are a health and safety issue, and do not bear on any allegations the Agency failed to accommodate the Complainant. While the Complainant has had some difficulty performing some of his work, Ex. 1 at 149. The Complainant has been able to complete one-hundred percent of his required work duties despite his diagnosis with Multiple Sclerosis. Ex. 1 at 145. Any adjustments the Complainant has needed to his work schedule have been able to be addressed through the currently available maxi-flex schedule that employees at AOU have available to them. Ex. 1 at 219.

The Complainant has not provided specific actions beyond the continued availability of the maxi-flex schedule.

The Complainant has not provided evidence that he was subject to an unsafe work environment. There has not been showing that OSHA should have found a violation regarding the quality of air or exposure to chemicals which would have required a reasonable accomodation from management.

The Complainant states the Agency retaliated against him for prior protected activity when he was removed from the training program at FLETC. The Complainant admidts that he has not participated in any EEO activity prior to the filing of this complaint. Ex. 1 at 89. The only prior action the Complainant has taken toward the Agency or any agency prior to his removal from the training program is his Workers Compensation claim. ROI at 59.

On April 4, 2018, Complainant filed a claim with the Office of Workers' Compensation Programs, Department of Labor (OWCP) alleging that he got MS from cleaning and maintaining firearms in a toxic area with no protection provided for skin contact and inhaling toxins. ROI at 97. On June 1, 2018, he submitted a doctor's note as part of his OWCP application. The doctor's noted that "while the cause of [MS] is still being researched, scientists believe that the interactions of several different factors are involved such as environmental and occupational factors." ROI at 138. On March 19, 2019, Complainant got a new doctor's note, Ex. 3, that stated affirmatively that his disease was caused by his working conditions, stating there is a connection between Multiple Sclerosis and working around chemical solvents and therefore there is a connection between the Complainants working conditions and his development of MS. He also stated that countless studies all in agreement that exposure to toxins causes MS. The Agency sought to take discovery on this issue. However, the doctor who wrote the note no longer works for the Complainant's medical provider. The medical provider was not able to produce the cited studies.

The Complainant provided an affidavit from Dr. Joseph Clark on July 27, 2021. In his affidavit Dr. Clark is adamant that the statements in his letters referenced above are not in conflict with one another. This is not persuasive. In the letter from June 1, 2018, Dr. Clark clearly states that the cause of Multiple Sclerosis is still being researched however, there are some chemical exposures such as lead, heavy metals, cleaning solvents, neurotoxin chemicals, and organic solvents which are linked to this disease. In his letter from March 19, 2019, Dr. Clark states with certainty that the Complainant's Multiple Sclerosis was caused by his exposure to chemicals at work. These two statements are based on the same evidence and scientific studies. The first statement is aligned with the statements in the articles Dr. Clark cited in his

letter, that currently medical science does not know what causes Multiple Sclerosis, however there are certain factors that can increase your risk of developing Multiple Sclerosis. The second statement does not align with the articles cited by Dr. Clark, stating with certainty that the Complainant's exposure to chemicals caused his Multiple Sclerosis. These two statements are conflicting in that one states the cause of Multiple Sclerosis is still being researched, while the second claims to know the cause of the Complainant's Multiple Sclerosis. These conflicting statements affect the credibility of Dr. Clark's opinion and tend to make his arguments less persuasive.

The Complainant has put Dr. Clark forward as an expert on the cause of his Multiple Sclerosis. While Dr. Clark is undoubtably a skilled practitioner in the recognition and treatment of Multiple Sclerosis in his patients, his successful diagnosis and treatment of a disease does not qualify him as an expert regarding the root cause of that disease. Additionally, the Complainant has not presented evidence that Dr. Clark is an expert with respect to the causation of Multiple Sclerosis. Dr. Clark first put forth his opinion that the cause of the Complainant's Multiple Sclerosis was unknown, then after he researched the topic over a short period of time, his opinion changed from one of uncertainty to one of absolute certainty. This underscores the prior statement that Dr. Clark made no attempt to determine the cause of the Complainants MS when he first met with him, only afterwards did Dr. Clark educate himself on the causes of MS to help determine CP's cause, leading to his expertise not going to this determination. Dr. Clark attributes this change to "countless" articles on the subject which he and a physician's assistant reviewed. Of the articles submitted by Dr. Clark, only "Organic solvents and MS susceptibility" addresses similar situations as those the Complainant has experienced. (Exhibit 11) This article also does not provide a definitive cause for Multiple Sclerosis, only a list of potential factors

which may increase your likelihood of developing Multiple Sclerosis, those factors were two genetic factors, one which provides protection from development of Multiple Sclerosis, and another which increases general susceptibility, smoking, and exposure to organic solvents. Dr. Clark has provided no information regarding whether the Complainant has either referenced genetic markers, only stating that he has no family history of Multiple Sclerosis which is not evidence of a genetic propensity. Further, Dr. Clark has not disclosed whether the Complainant has ever been a smoker. The rate of Multiple Sclerosis in the general population is between .001 and .0013 Looking at the article cited, it would indicate an increase in susceptibility to Multiple Sclerosis based solely on exposure to organic solvents to be between .0011 and .0015, an increase of between one and two one hundredths of one percent. While the article did indicate there was a possible increase in the susceptibility of an individual to Multiple Sclerosis due solely to exposure to organic solvents, only exposure to organic solvents was the least reliable of the results obtained in this study. The study provided a p-value for only exposure to organic solvents of .9, indicating that 9 times out of 10 the results were indistinguishable from random, not the .004 cited by Dr. Clark in his letter and affidavit. To compare, only having a genetic susceptibility to Multiple Sclerosis, as tested by this article had a p-value of <0.0001, lacking the genetic protection alone, had a p-value of 0.0001, smoking alone had a p-value of 0.002. The results regarding the increase in susceptibility due to only exposure to organic solvents is highly suspect. With respect to the other articles, none of them reference complainant's situation. Dr .Clark cites an article by Culpepper, which states that soldiers deployed in combat zones have .224 higher rate of Multiple Sclerosis than soldiers who are not deployed in combat zones; (Exhibit 4) an article by Wallin and Culpepper which indicates plausible potential factors which might increase incidence of Multiple Sclerosis among soldiers deployed in combat zones

including vaccinations, infectious diseases among troops, airborne exposures, or the military experience itself;(Exhibit 5) an article from the Research Advisory committee which states that more research is needed into the possible link between military service and Multiple Sclerosis; and several others, all of which are not germane to the situation or conditions experienced by the Complainant. The Dr. Has only shown that environmental factors cause a slight increase in you likelihood of developing MS, Dr. has made no attempt to determine whether CP was a smoker, or whether he possessed either of the genetic factors listed, this further undercuts the Dr.'s position as an expert.

IV. Applicable Law

A. Legal Standards Governing Decisions Without Hearing

Under 29 C.F.R. § 1614.109(g) a case can be decided without a hearing. 29 C.F.R. § 1614.109(g) gives the Administrative Judge the authority to do so on their own initiative after giving 15 days' notice.

Murphy v. Dept. of the Army, EEOC App. No. 01A04099 (July 11, 2003) states that such summary judgment is proper when:

> [G]iven the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id*. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor.

Anderson, *supra*, 477, U.S. 248, noted that, "the substantive law will identify which facts are material." Thus, "Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. Moreover, the decision may be entered when there is no evidence to support an essential element

of the case, since that makes the remaining disputes immaterial to the outcome. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).

MD-110 (2013), 7-18, notes that:

> The party opposing summary judgment must identify the disputed facts in the record with specificity or demonstrate that there is a dispute by producing affidavits or records that tend to disprove the facts asserted by the moving party. The complainant must present evidence that lets the AJ to reasonably find in the

complainant's favor on the disputed point. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596. (1991).

The AJ must first identify the essential elements of the complainant's case and then decide whether the evidence supports a finding on each of them. *Anderson*, *supra*, *Celotex*, *supra*.

B. Elements of Proof That Need to Be Met Before a Hearing is Warranted

A *prima facie* case of discrimination can be created with circumstantial evidence. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Dept. of Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); most often by proof that the complainant is a member of a protected group, who was treated differently than similarly situated persons who do not belong to that protected group, *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978), or in an age discrimination case, someone significantly younger. *O'Connor v. Consolidated Coin Caterers Inc.*, 517 U.S. 308, 313 (1996). The comparator must be similarly situated to the complainant with respect to the factors that might reasonably motivate someone to take the challenged actions. *Patton v. Dept. of Justice*, EEOC App. No. 0120092405 (Sep. 2, 2010); *Shaffer v. U.S.P.S.*, EEOC App. No. 01A31449 (Feb. 17, 2004); *Jackson v. U.S.P.S.*, EEOC No. 01954859 (Aug. 23, 1996).

If Complainant establishes a *prima facie* case of discrimination, the Agency must introduce evidence of a non-discriminatory reason for its actions. *Burdine*, 450 U.S. at 253-54; *McDonnell Douglas*, 411 U.S. at 802. If it does, the complainant must prove that the Agency's explanation is a pretext for unlawful discrimination. *Burdine,* 450 U.S. at 253; *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Hicks,* 509 U.S. at 511; *McDonnell-Douglas,* 411 U.S. at 804.

Pretext means that the Agency's stated explanation is not credible; not that it is harsh or unwise. *Texas Dept. of Comm. Aff. v. Burdine*, 450 U.S. 248, 259 (1981). S*ee Glass v. U.S.P.S.*, 07A50068 (2006) and *Thomas v. Dept. of Tran.*, EEOC App. No. 01945798 (Dec. 12, 1996) (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)).

Proof that the Agency's decision proved mistaken in hindsight does not show pretext, *Cousins v. Dept. of Tran.*, EEOC App. No. 0120072572 (July 1, 2009); nor does proof of procedural irregularities that fall within a range that is consistent with human error. *Waterbury v. Agriculture*, EEOC App. No. 01A12182 (Jun. 19, 2002), *Hill v. Air Force*, EEOC App. No. 05950123 (Jul. 20, 1995; *Middleton v. TVA*, EEOC App. No. 01940448 (Nov. 23, 1994). Disproof of one of several explanations, does not establish pretext when the credible explanations suffice to explain the decision. *Kimble v. Dept. of the Navy*, EEOC App. No. 01983020 (Aug. 22, 2001).

A *prima facie* case of reprisal can be created by showing that: (1) the Complainant engaged in a protected activity; (2) the allegedly retaliating officials knew of the protected activity; (3) subsequently, the Complainant was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v.*

Dep't of the Air Force, EEOC App. No. 01A00340 (Sept. 25, 2000); *Mason v. Tennessee Valley Authority*, EEO App. No. 01840126 (Dec. 31, 1984).

The EEO statutes prohibit retaliation against an individual because he has engaged in protected activity, which includes either: opposition to a practice made unlawful by one of the EEO statutes, or filling a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under an applicable EEO statute. Section 8: *Retaliation*, **EEOC** Compliance Manual, Volume II (BNA) §§ 8-II B, 8-II C, 614:0001-0004 (1998). Workers

The nexus can be shown when the adverse treatment follows close on the heels of the protected activity. *See Lee v. Dep't of Interior*, EEOC App. No. 01A62376 (Aug. 25, 2006) (citing *Simens v. Dep't of Just.*, EEOC Request No. 05950113 (Mar. 28, 1996)). *Clark Cnty. Sch. District v. Bredeen*, 532 U.S. 268, 273-274 (2001) suggested that three to four months is close enough. *King v. Dep't of the Air Force,* EEOC App. No. 01A62609 (July 26, 2006) OFO held that six months is too long. An agency does not have to delay non-discriminatory personnel actions it has planned to take simply because the employee has engaged in EEO activity. *See, e.g., Sotomayer v. Dep't of the Army,* EEOC App. No. 01A43440 (May 17, 2006).

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. *See* 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability

pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. *See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, EEOC Notice No. 915.002 (Oct. 17, 2002) (*Enforcement Guidance on Reasonable Accommodation*). An employee is required to show a nexus between the disabling condition and the requested accommodation. *See Hampton v. United States Postal Service*, EEOC Appeal No. 01986308 (July 31, 2002), (citing *Wiggins v. United States Postal Service*, EEOC Appeal No. 01953715 (April 22, 1997)) The employee who seeks an accommodation must request it and document his disability. *Sager v. U.S.P.S.*, 01982016 (Jun. 11, 2001); *Brooks v. U.S.P.S.*, EEOC App. No. 01980061 (Jun. 19, 2001). Thus, an employer is not obligated to accommodate a disability unless the employee requests an accommodation and provides support for the assertion that she is disabled. *Sager v. Postmaster General*, 01982016 (Jun. 11, 2001); *Brooks v. USPS*, EEOC No. 01980061 (Jun. 19, 2001); *White v. U.S. Postal Service*, EEOC No. 01840158 (Jan. 7, 1987)*; Pascale v. Department of Navy*, EEOC No. 03850092 (Mar. 5, 1986); *McAuliffe v. Department of Treasury*, EEOC No. 01842354 (May 19, 1986).

The EEO process for obtaining a reasonable accommodation requires agencies and complainants to engage in an "interactive process" regarding reasonable accommodations to determine the best options for both the employee and management. Once an employee makes a request for an accommodation, the employer may be required to initiate an informal, interactive process with the employee in order to craft a reasonable accommodation. See 29 C.F.R. § 1630.2(o)(3); Enforcement Guidance Questions 1, 5 and nn. 17, 22. An employer should respond expeditiously to requests for reasonable accommodation and proceed with the interactive process in the same manner. Enforcement Guidance Question 10.14. The interactive process should

identify the precise limitations created by the disability and potential reasonable accommodations to overcome those limitations. 29 C.F.R. § 1630.2(o)(3); Interpretative Guidance Sections 1630.2(o), 1630.9. Employers can demonstrate good faith in a number of ways, including meeting with the employee, requesting information about his or her limitations, and offering alternatives to burdensome accommodation requests. If the employer does not engage in the interactive process, it may not discover potential, previously unknown accommodations, and may be liable for failing to provide a reasonable accommodation. Employees who refuse to cooperate in that process are not entitled to an accommodation. See Carleen L. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120151465, 2017 EEOPUB LEXIS 1348 (May 12, 2017), citing EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation); see also Zachary K. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130795, 2015 EEOPUB LEXIS 3106 (Nov. 19, 2015

VI. Analysis and Decision

Throughout the EEO investigation process, the Complainant has focused on what could have been done to possibly prevent his development of MS. The Complainant's evidence regarding the possible causes of his MS is not relevant to the accepted issues of this case as the causation of his disability is irrelevant with respect to whether the Agency discriminated against him or retaliated against him because of his disability. There is nothing in the record which provides definitive evidence that had he been in a work environment with safer air and safer stations to clean firearms, that he would not have developed MS. Whether the Complainant's

Multiple Sclerosis was caused by his exposure to chemicals while he was at work is not necessary in determining whether he has established a prima facie case for the following issues.

A. Removal from FLETC training program.

Regarding the Complainants claim that he was subject to discrimination based on his disability (physical) and retaliation (prior protected activity) when he was pulled from a FLETC training course on May 8, 2018, the Complainant has failed to establish a prima facie case for both discrimination and retaliation.

Regarding the claim of discrimination, the Complainant is admittedly a member of a protected class as he has been diagnosed with Multiple Sclerosis and thus is a disabled person. However, the evidence presented by the Complainant does not support his claim of discrimination. Rather, the evidence presented by the Complainant destroys any possible claim of discrimination as there were three other individuals who were also removed from the course, who were situated precisely the same as the Complainant with respect to the factors that might reasonably motivate someone to take the challenged actions. Further, the Complainant failed to provide any evidence that he was treated differently than the other three AOU employees who were also removed from the training course on the same day.

Additionally, assuming arguendo, should the Complainant establish a prima facie case for discrimination, the Agency has provided a reasonable non-discriminatory reason for removing the employees from the FLETC training course, budgetary concerns. The Complainant has failed to prove by a preponderance of the evidence that the Agency's stated reason for his removal from the course was merely pretextual, and the underlying motive of the Agency was discriminatory. While it is arguable that the actions of the Agency in removing the individuals from the training program after they had completed half of the required course may not have

been the best decision, an erroneous decision would not provide the necessary grounds to show any pretext for an underlying discriminatory intent on the part of the Agency.

Regarding the Complainant's claim the Agency retaliated against him due to prior protected activity when he was removed from the FLTEC training course on May 9, 2018, the Complainant has failed to state a prima facie claim of retaliation. The Complainant has stated that the Agency retaliated against him due to his prior filing of a Workers Compensation claim, and prior EEO activity. A Workers Compensation claim is not protected activity under EEO statute. To establish a prima facie case of retaliation the Complainant must show, (1) the Complainant engaged in a protected activity; (2) the allegedly retaliating officials knew of the protected activity; (3) subsequently, the Complainant was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. The Complainant participated in EEO activity when he told management he had a medical condition, and when he requested and received approval for liberal leave use due to his medical condition. The Complainant was also subject to adverse treatment by the agency when he was removed from the FLTEC training course. The Complainant has not, however, provided any evidence that the officials he alleges retaliated against him had any knowledge that the Complainant had participated in prior EEO activity. Further, the Complainant provided no evidence that there was a causal connection between his prior EEO activity, and his being removed from the FLTEC training course.

For the above reasons the Agency's motion for Summary Judgement is granted with respect to accepted issue (1).

B. Denial of a Reasonable Accommodation

Regarding the Complainant's claims that he was subject to disability discrimination (physical) and retaliation (prior protected activity), when, beginning on a date to be specified and ongoing, management denied Complainant a reasonable accommodation when management failed to improve Complainant's working conditions in areas such as air quality and exposure to harmful chemical, the Complainant has failed to show that the Agency denied his request for reasonable accommodation.

The Complainant has provided no evidence that he requested an accommodation after the discovery of his disability other than his request for liberal leave. He had no grounds to request an accommodation before the discovery of his disability. The Complainant has made no specific requests regarding diminishing his personal exposure to solvents or other allegedly harmful chemicals since the discovery of his disability.

The Complainant has not shown that the Agency failed to provide him with a reasonable accommodation. Reasonable Accommodation serves two fundamental purposes, to remove barriers that would prevent people with disabilities from applying for or performing their required tasks, and to expand the pool of available employees. The Complainant has documented requests that "he and his family be taken care of", and his supervisors have stated that the Complainant asked for safe air to breathe and safe stations to clean firearms. These requests were not made by the Complainant to help him complete the duties of his job, inspecting, rebuilding, refinishing, modifying, maintaining, or testing firearms. In addition, the Complainant was not willing to participate further with the informal interactive process regarding these requests to management until depositions were taken in this case. The record indicates that the Complainant was given multiple opportunities to request reasonable accommodations from the Agency yet continued to only request "safe air to breathe and safe stations to clean firearms". The

Complainant has not requested anything specific to help him to complete his job duties, rather the Complainant has testified that he completes 100% of his job duties and has not submitted a request for reasonable accommodation. The Complainant has consistently failed to tell the agency specific actions they should have taken. Therefore, as the Complainant did not request a reasonable accommodation, the Agency did not discriminate against him when they did not provide what the Complainant demanded.

Further, the Agency, upon the Complainants request, granted the Complainant liberal leave to address any medical issues which could arise from his Multiple Sclerosis. The Complainant testified that so long as the liberal leave measures remained in place, he was confident he could continue to successfully complete the tasks required of him in his position. The Agency granting the Complainant liberal leave to address his medical issues is their granting him a reasonable accommodation for his disability. This shows the Agency would reply reasonably to any reasonable suggestions made by the Complainant.

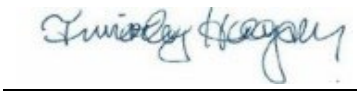
For the above reasons, the Agency's motion for Summary Judgement is granted with respect to accepted issue (2).

VII. Final Order

Accordingly, the Agency's Motion for Summary Judgment is granted in total. Decision is rendered in favor of the Agency. This is the Final Order in this case.[1]

It is so **ORDERED.**

For the Commission:



Hon. Timothy Hagan
Administrative Judge

[1] The undersigned has considered all documents in the ROI and/or submitted by the parties.

CERTIFICATE OF SERVICE
The signature set forth above confirms service, via email, on the date listed in the caption, on these parties:
Ms. Jody Seymore, Complainant: ar15xm1@yahoo.com
Mide Famuyiwa, Agency Representative: olamide.famuyiwa@ice.dhs.gov
LeAnn Messacaop, Complainant's Representative: L.Mezzacapo@iceunion.org

NOTICE OF RIGHT TO FILE APPEAL
NOTICE TO THE PARTIES

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(b), 109(g) or 109(i). **With the exception detailed below, Complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying Complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. In April 2020, a memorandum was issued by Carlton Hadden to the Federal Sector EEO Directors and officials that contained information and directives regarding the tolling of timeframes during the pandemic. In July 2020, this memorandum was modified to direct Agencies to return to issuing final actions. See https://eeoc.gov/update-april-6-2020-memorandum-processing-information.

Complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. Complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of Complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit, and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. § 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has not issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, Complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. Complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission and should certify to the Commission the date and method by which such service was made on the Agency.

You may file an appeal with the Commission's Office of Federal Operations **when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision**. 29 C.F.R. § 1614.110(a). You will have **thirty (30) days** to file an appeal from the time you receive the agency's final order. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below. If you do not use the EEOC Public Portal to file your appeal, you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations, and you must certify the date and method by which you sent a copy of your appeal to the agency.

HOW TO FILE AN APPEAL

RECOMMENDED METHOD –
The EEOC highly recommends that you file your appeal online using the EEOC Public Portal at https://publicportal.eeoc.gov/, and clicking on the "Filing with the EEOC" link. If you have not already registered in the Public Portal, you will be asked to register by entering your contact information and confirming your email address. Once you are registered you can request an appeal, upload relevant documents (e.g., a statement or brief in support of your appeal), and manage your personal and representative information. During the adjudication of your appeal, you can also use the Public Portal to view and download the appellate record. **If you use the Public Portal to file your appeal you do not have to send a copy to the agency.** A complainant with an account with the EEOC's Public Portal may waive receipt of the appellate decision via U.S. mail and receive the decision via the EEOC Public Portal. Federal agencies will receive the appellate decision via the FedSEP digital platform.

BY MAIL – You may mail your written appeal to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013-8960

BY HAND DELIVERY OR COURIER – You can also hand-deliver or send your appeal by courier service to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
131 M St., NE
Washington, D.C. 20507

BY FAX – Finally, you may send it by facsimile to (202) 663-7022.
If you elect to mail, deliver, or fax your appeal you should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what you are appealing. Additionally, you must serve the agency with a copy of your appeal, and include a statement certifying the date and method by which service to the agency was made.
Facsimile transmissions over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. See 29 C.F.R. § 1614.504. If Complainant believes that the Agency has failed to comply with the terms of its final action, Complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If Complainant is not satisfied with the Agency's attempt to resolve the matter, he or she may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. Complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35)

calendar days after Complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

Applicant Details

First Name	**Nick**
Last Name	**Bushelle**
Citizenship Status	**U. S. Citizen**
Email Address	**nbushelle@gmail.com**
Address	**Address** Street **24410 W Blvd Dejohn** City **Naperville** State/Territory **Illinois** Zip **60564**
Contact Phone Number	**6302513420**

Applicant Education

BA/BS From	**University of Illinois-Urbana-Champaign**
Date of BA/BS	**December 2016**
JD/LLB From	**University of Iowa College of Law** **http://www.law.uiowa.edu**
Date of JD/LLB	**May 15, 2020**
Class Rank	**Not yet ranked**
Law Review/Journal	**Yes**
Journal(s)	**Iowa Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.